No. 05-1272
Title: Rockwell International Corp., et al., Petitioners
v.
United States, et al.
Docketed: April 5, 2006
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (99-1351, 99-1352, 99-1353)
Decision Date: March 5, 2004
Rehearing Denied: January 4, 2006
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Apr 4 2006 | Petition for a writ of certiorari filed. (Response due May 5, 2006) |
| Apr 25 2006 | Order extending time to file response to petition to and including July 5, 2006, for all respondents. |
| Jul 3 2006 | Order further extending time to file response to petition to and including July 14, 2006, for all respondents. |
| Jul 14 2006 | Brief of respondent United States in opposition filed. |
| Jul 14 2006 | Brief of respondent James S. Stone in opposition filed. |
| Jul 14 2006 | Brief amicus curiae of Chamber of Commerce of the United States filed. |
| Jul 25 2006 | Reply of petitioners Rockwell International Corp., et al. filed. (Distributed) |
| Jul 26 2006 | DISTRIBUTED for Conference of September 25, 2006. |
| Sep 26 2006 | Petition GRANTED, limited to Question 1 presented by the petition. Justice Breyer took no part in the consideration or decision of this petition. |
| Sep 26 2006 | The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, October 26, 2006. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 20, 2006. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 27, 2006. Justice Breyer took no part in the consideration or decision of this petition. |
| Sep 29 2006 | SET FOR ARGUMENT ON Tuesday, December 5, 2006. |
| Oct 12 2006 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners. |
| Oct 25 2006 | Joint appendix filed. |
| Oct 25 2006 | Brief of petitioner Rockwell International Corp. and Boeing North American, Inc. |
| Oct 25 2006 | Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. |
| Oct 26 2006 | Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed. |
| Oct 26 2006 | Brief amici curiae of BP America Production Company, Chevron Corporation, and Shell Oil Company filed. |
| Oct 26 2006 | Brief amicus curiae of Comstock Resources, Inc. filed. |
| Oct 26 2006 | Brief amici curiae of American Hospital Association, et al. filed. |
| Oct 26 2006 | Motion for leave to file amicus brief out-of-time filed by National Defense Industrial Association. |
| Oct 26 2006 | Brief amicus curiae of National Industrial Defense Association filed. |

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|---|---|
| Oct 30 2006 | Record received from U.S.C.A. for 10th Circuit. (3 boxes) |
| Oct 31 2006 | CIRCULATED. |
| Nov 6 2006 | Motion for divided argument filed by respondent the Solicitor General. |
| Nov 13 2006 | Motion for divided argument filed by respondent GRANTED. Justice Breyer took no part in the consideration or decision of this motion. |
| Nov 20 2006 | Brief of respondent United States, et al.filed. (Distributed) |
| Nov 20 2006 | Brief of respondent James S. Stone filed. (Distributed). |
| Nov 20 2006 | Brief amicus curiae of Taxpayers Against Fraud Education Fund and National Employment Lawyers Association filed. (Distributed) |
| Nov 20 2006 | Brief amici curiae of Patricia Haight and In Defense of Amimals filed. (Distributed) |
| Nov 20 2006 | Brief amicus curiae of Senator Charles Grassley filed. (Distributed). |
| Nov 27 2006 | Reply of petitioners Rockwell International Corp. and Boeing North American, Inc. filed. (Distributed) |
| Dec 1 2006 | Record received from U.S.D.C. for the District of Colorado. (11 boxes) |
| Dec 4 2006 | Motion for leave to file amicus brief out of time filed by National Industrial Defense Association GRANTED. Justice Breyer took no part in the consideration or decision of this motion. |
| Dec 5 2006 | Argued. For petitioners: Maureen E. Mahoney, Washington, D.C. For respondent United States: Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent Stone: Maria T. Vullo, New York, N.Y. |

Supreme Court, U.S.
FILED
051272 APR 14 2006
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No.

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

2. Whether the judgment must be reversed because the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, either on their face or as applied in this case, violate the Appointments and Take Care Clauses of Article II of the United States Constitution?

## RULE 29.6 STATEMENT

Petitioner Rockwell International Corp. was renamed Boeing North American, Inc. Petitioner Boeing North American, Inc. has since been merged into The Boeing Company. State Street Bank and Trust Company beneficially owns 10% or more of The Boeing Company's stock.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

RULE 29.6 STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR GRANTING THE WRIT ..... 13

I. THE TENTH CIRCUIT'S JUDGMENT DEEPENS AN EXISTING CIRCUIT SPLIT AND EFFECTIVELY EVISCERATES § 3730(e)(4) ..... 14

A. The Tenth Circuit's Interpretation Of The Governing Standard Conflicts With The Interpretations Adopted By The Third, Eighth, Ninth, Eleventh, And D.C. Circuits ..... 14

B. There Is No Reason To Defer Review ..... 22

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTION RESERVED IN *STEVENS*—WHETHER THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT VIOLATE ARTICLE II ..... 24

A. The *Qui Tam* Provisions Of The False Claims Act Violate The Appointments Clause ..... 24

## TABLE OF CONTENTS—Continued

Page

B. The *Qui Tam* Provisions Of The False Claims Act Violate The Take Care Clause ..... 2

CONCLUSION ..... 3

## TABLE OF AUTHORITIES

Page(s)

### CASES

*Auffmordt v. Hedden*,
137 U.S. 310 (1890) ..... 26

*Buckley v. Valeo*,
424 U.S. 1 (1976) ..... 14, 24, 26, 30

*Comstock Resources, Inc. v. Kennard*,
125 S. Ct. 2957 (2005) ..... 22

*Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) ..... 16, 17

*Edmond v. United States*,
520 U.S. 651 (1997) ..... 26

*Gravitt v. General Electric Co.*,
680 F. Supp. 1162 (S.D. Ohio 1988) ..... 29

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 28

*Marsh v. Chambers*,
463 U.S. 783 (1983) ..... 30

*Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*,
276 F.3d 1032 (8th Cir. 2002) ..... 20, 23

*Morrison v. Olson*,
487 U.S. 654 (1988) ..... 14, 27, 29

*Nixon v. Administrator of General Services*,
433 U.S. 425 (1977) ..... 27

**TABLE OF AUTHORITIES—Continued**

**Page(s**

*Riley v. St. Luke's Episcopal Hospital*,
252 F.3d 749 (5th Cir. 2001) ..... 27, 28, 3(

*Saudi Arabia v. Nelson*,
507 U.S. 349 (1993) ..... 13, 14

*Seal 1 v. Seal A*,
255 F.3d 1154 (9th Cir. 2001) ..... 18, 19

*United States v. Bank of Farmington*,
166 F.3d 853 (7th Cir. 1999) ..... 23, 24

*United States v. Germaine*,
99 U.S. 508 (1879) ..... 26

*United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516
(9th Cir. 1998) ..... 18

*United States ex rel. Barajas v. Northrop Corp.*,
5 F.3d 407 (9th Cir. 1993) ..... 23

*United States ex rel. Burr v. Blue Cross & Blue Shield of Florida, Inc.*, 882 F. Supp. 166
(M.D. Fla. 1995) ..... 29

*United States ex rel. Coughlin v. IBM*,
992 F. Supp. 137 (N.D.N.Y. 1998) ..... 29

*United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) ..... 23

*United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675
(D.C. Cir. 1997) ..... 23, 24

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

*United States ex rel. Grayson v. Advanced Management Technology, Inc.*, 221 F.3d 580 (4th Cir. 2000) ..... 23

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) ..... 23

*United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) ..... 27

*United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 23

*United States ex rel. McKenzie v. BellSouth Telecommunications*, 123 F.3d 935 (6th Cir. 1997) ..... 23, 24

*United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) ..... 15, 16, 17, 23

*United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) ..... 27

*United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994) ..... 24

*United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 19, 20, 21

*United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 16, 28

## TABLE OF AUTHORITIES—Continued

Page(s

*United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994).....2

*United States ex rel. Waris v. Staff Builders, Inc.*, No. CIV. A. 96-1969, 1999 WL. 788766 (E.D. Pa. Oct. 4, 1999).....1

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).....14, 2

*Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970).....3

*Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).....2

**FEDERAL STATUTES**

28 U.S.C. § 1254(1).....1

31 U.S.C. §§ 3729-33.....1

31 U.S.C. § 3730 .....*passim*

**LEGISLATIVE MATERIALS**

132 Cong. Rec. H6482.....3

H.R. Rep. No. 99-660 (1986).....2

S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 .....28, 3

## TABLE OF AUTHORITIES—Continued

Page(s)

### OTHER AUTHORITY

42 Op. Off. Legal Counsel 207 (1989) ..... 25, 26, 28, 29, 30

Brief for the United States as Amicus Curiae, *Comstock Res., Inc. v. Kennard*, 543 U.S. 923 (2004) (No. 04-165) ..... 23

John T. Boese, 1 Civil False Claims and *Qui Tam* Actions (3d ed. 2006) ..... 13, 22

## OPINIONS BELOW

The opinion of the Tenth Circuit affirming in part and ordering limited remand (Pet. App. 1-48a) is reported at 282 F.3d 787. The opinion of the Tenth Circuit affirming after limited remand (Pet. App. 49-55a) is unreported, but is available at 92 Fed. Appx. 708. The order of the Tenth Circuit denying rehearing and rehearing *en banc* (Pet. App. 56-57a) is unreported.

## JURISDICTION

The Tenth Circuit denied rehearing and rehearing *en banc* on January 4, 2006. Pet. App. 56-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 77-82a) reproduces the relevant text of 31 U.S.C. § 3730 and Article II of the United States Constitution.

## STATEMENT OF THE CASE

This is a *qui tam* action brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, by James S. Stone, a former employee at the Rocky Flats nuclear weapons plant in Golden, Colorado. Rockwell International Corporation ("Rockwell")[1] operated Rocky Flats for the Department of Energy ("DOE"), and the jury found that Rockwell secured some payments from DOE in violation of the FCA. As the case comes to this Court, there is no dispute that Stone's complaint was based on information that had been previously disclosed to the public, and that the *qui tam* provisions of the FCA accordingly barred Stone's claims unless he qualified as an "original source" within the meaning of 31 U.S.C. § 3730(e)(4). The Tenth Circuit's holding that Stone was authorized to maintain the action rested on an interpretation of the original source rule that

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[1] In 1996, The Boeing Company acquired Rockwell and changed its name to Boeing North American, Inc. Thereafter the contract between Rockwell and DOE for management of Rocky Flats was amended to reflect the contractor's name change.

departs from the text of the statute and conflicts with the legal standards adopted in five other circuits.

The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). Stone faced a serious obstacle in establishing any first-hand knowledge of the fraud at issue because his employment was terminated more than a year before the events that gave rise to the jury's finding of liability. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). But the Court of Appeals interpreted the statute to mean that a relator needs only to have some background "knowledge 'underlying or supporting' the fraud allegation." Pet. App. 20-21a.

Applying that standard, it made no difference that Stone did not even claim to have direct knowledge of the only false statements and environmental violations that he actually sought to prove at trial. As Judge Briscoe explained, the "direct and independent knowledge possessed by" the relator in this case was so tangential that it "could have been omitted entirely at trial without affecting the outcome." Pet. App. 48a. Indeed, it was. Stone did not testify, and the document he highlighted as demonstrating his "original" information was never even introduced into evidence. Stone could not have recovered under the legal standards applied in other circuits and this Court should grant review to resolve this important circuit split.

This Court should also grant review to resolve whether the *qui tam* provisions of the FCA violate Article II. Both the Appointments Clause and the Take Care Clause bar Stone from litigating on behalf of the United States.

**Procedural History**

Stone was employed at Rockwell as an engineer until his employment was terminated in March of 1986. Pet. App. 3a. Two years after his departure, newspapers published detailed reports concerning environmental compliance problems at Rocky Flats associated with a solidified waste

called "pondcrete." Pet. App. 60a.[2] In May of 1988, several insolid pondcrete blocks were discovered on an outdoor pad where they were stored. Tr. 601-02, 631-32, 1124-25.[3] This prompted a canvass revealing "several thousand boxes" of insolid pondcrete. Tr. 636-38, 784-86.

In June of the following year, the Federal Bureau of Investigation ("FBI") executed a search warrant at Rocky Flats, and one month later, Stone filed his *qui tam* suit. Pet. App. 4a. Stone's complaint was scattershot, covering a broad range of issues and "contain[ing] little or no specification of the statements he believed were false." CA App. at 0921; *see also* Pet. App. 4-5a. At the conclusion of the Government's investigation, Rockwell pled guilty to ten environmental violations. Pet. App. 6-7a.

When Stone filed his complaint in 1989, he provided the Government with a statement that disclosed "substantially all [of his] material evidence and information," as mandated by 31 U.S.C. § 3730(b)(2). Pet. App. 6a; CA App. 0522. The United States thereafter examined all "the evidence in [its] files," CA App. at 0916, and found no "indication that Rockwell had made misrepresentations to DOE, or concealed its conduct from DOE, or otherwise committed fraud or submitted false statements to DOE." CA App. at 0921; *see also id.* at 0920, 0913 (Government "unable to ascertain that Mr. Stone had a viable False Claims Act case"). Accordingly, the Government filed a notice in March of 1992 declining to intervene. Pet. App. 6a.

In November of 1995, based on information discovered in a separate case, CA App. 0903-04, 0923-37, the Government

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[2] Pondcrete is formed by mixing "sludge and liquids retrieved from ... solar ponds" with Portland cement. Tr. 982. Glen Sjoblom, an expert with high-level experience at EPA, testified that this methodology "was generally accepted" as the proper way to handle such wastes, and was used by at least seven other DOE facilities. Tr. 4731, 4739.

[3] The trial transcript is cited herein as "Tr." The Appellant's Appendix before the Tenth Circuit is cited herein as "CA App." Appellee/Cross-Appellant James S. Stone's Supplemental Appendix before the Tenth Circuit is cited herein as "SA."

decided to intervene and, together with Stone, filed an Amended Complaint. Pet. App. 8-9a. The Amended Complaint asserted an FCA count based on the theory that Rockwell secured payments from DOE by making misstatements relating to and concealing problems with pondcrete. CA App. 0980-95.[4] Stone, but not the United States, asserted another FCA count charging concealment of plutonium contamination. Pet. App. 8-9a; CA App. 0998-1004. The district court ordered a separate trial on Stone's plutonium claim, Pet. App. 9a, which has not yet been scheduled. The pondcrete claim was tried to a jury. *Id.* Stone never testified at trial. On the verdict form, the jury was asked to determine liability under the FCA by answering questions corresponding to ten different claims for payment submitted between October 1, 1986 and December 30, 1989. *Id.* The answers established that the jury found that Rockwell violated the FCA with respect to three claims submitted between April 1987 and September 1988, but not with respect to the seven remaining claims. CA App. 1119-20.[5] The court entered judgment for both plaintiffs in the amount of $4,172,327.40. CA App. 1569.[6]

**Proceedings Related To The Original Source Rule**

Rockwell moved to dismiss Stone's claims under Section 3730(e)(4). CA App. 0116-35. Newspaper articles published

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[4] The Amended Complaint also charged concealment of "saltcrete" and "spray irrigation" problems. CA App. 0980-91. Counts II-V asserted various common law and contract claims. Pet. App. 8a.

[5] For all periods covering spray irrigation, the jury found for Rockwell. Pet. App. 50a. Stone conceded he was not an original source as to saltcrete. *Id.* Stone's right to remain in the case, accordingly, turned on his original source status as to pondcrete. *Id.* at 50-51a. The jury found that Rockwell did not breach its contract with DOE, and the court dismissed the remaining non-FCA claims with prejudice. *Id.* at 9-10a.

[6] The district court deferred Stone's motion for attorneys' fees pending appeal. Pet. App. 9a & n.2. Reversal of the judgment would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party. *See* 31 U.S.C. § 3730(d)(1) (prevailing party "shall" receive fees and costs).

before Stone filed his complaint in 1989 had alleged false statements and concealment of a wide range of environmental violations at Rocky Flats. CA App. 0232-52. Based on this record evidence, the district court squarely held that Stone's claims were based on "incidents that were widely covered in the news media," and that Stone could only proceed if he "satisf[ied] the 'original source' requirement." Pet. App. 60a. Stone did not challenge that finding on appeal.

The original source rule requires a relator both to know of and to disclose to the Government "the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). The district court held that Stone had satisfied his burden of proof but did not make any findings regarding Stone's direct knowledge about pondcrete.[7] The district court instead relied on Stone's awareness that Rockwell's compensation was tied in part to environmental compliance and on his allegation that he was generally "instructed not to divulge environmental ... problems to the DOE." Pet. App. 61a. The Tenth Circuit held that Stone had met his burden of proving that he was an original source of the claims that succeeded at trial because he knew and disclosed background information to the Government concerning pondcrete. Pet. App. 20a.

As described below, the Courts of Appeals are divided on the statutory standards for determining what a relator must know and disclose to the Government. Two circuits require knowledge of the fraudulent statement; two others require knowledge sufficient to show that the statement is false; and one evaluates whether the relator's information proximately caused the discovery of the fraud. In order to assess whether Stone could have prevailed under these

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[7] Rockwell renewed its motion after the jury verdict, and argued that Stone failed to prove that he was an original source with respect to his pondcrete allegations. Pet. App. 9a; CA App. 1153-54. The district court adhered to the prior ruling and denied Rockwell's motion with no findings specific to pondcrete. Pet. App. 14a, 64-65a, 67a.

standards, what Stone knew and disclosed to the Government, as well as the basis of Stone's claims, is summarized as follows.

1. Stone sought to prove his direct and independent knowledge through three documents: an affidavit filed with the district court, the Confidential Disclosure Statement he provided to the Government, and a one-page Engineering Order, dated 1982. Pet. App. at 17-20a. The Tenth Circuit relied on these documents to show that Stone had reviewed "a design for the process and mechanical system intended to be used for removing sludge from" the solar evaporation ponds and predicted "that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the 'pondcrete' blocks would rapidly disintegrate." CA App. 0509; Pet. App. 19a. Stone handwrote on the 1982 Engineering Order "[t]his design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." Pet. App. 18a; CA App. 0439. The Court of Appeals construed this annotation as explicitly "articulating [Stone's] belief that the proposed design for making pondcrete was flawed." Pet. App. 18a.[8] This information, in turn, was found to "support[]" Stone's allegation that Rockwell "ultimate[ly]" made false statements about pondcrete some five years after he reviewed the Order. Pet. App. 21a.

The Court of Appeals further held that the 1982 Engineering Order, entitled "Solar Evap. Pond Sludge Removal," alone sufficed to "to carry Stone's burden" of establishing that he "voluntarily provided [his direct and

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[8] Although Stone's affidavit includes general statements that "the design proposed by Rockwell management for making pondcrete" was defective, the only specific defect identified was the system for piping sludge from the solar ponds. CA App. 0298. Moreover, Stone's Confidential Disclosure Statement, which by its own terms and by statutory mandate included "substantially all material evidence and information" Stone possessed, *see* 31 U.S.C. § 3730(b)(2); Pet. App. 6a; CA App. 0522, only described a defect in the piping system. CA App. 0509-10.

independent] information to the Government," within the meaning of Section 3730(e)(4)(B). Pet. App. 52a; CA App. 0439.[9] The Order was buried in 2,300 pages Stone produced to the FBI, and the 302 reports memorializing Stone's meetings with the FBI make no mention of either pondcrete or the Engineering Order. Pet. App. 73a; CA App. 0306, 0439.

2. Although the Tenth Circuit relied on Stone's information about predicted defects in the piping as the "bas[is]" of Stone's FCA claims, Stone never actually advanced that theory as a basis for liability in the case. (And the Tenth Circuit made no finding that he did.) The Amended Complaint did not allege that known defects in the piping system caused the blocks to fail. CA App. 0980-85. Nor did Stone's Statement of Claims. That filing listed "the facts establishing [Plaintiffs'] entitlement to a judgment in their favor," and asserted that Rockwell knew pondcrete was insolid because Rockwell employees *"reduce[ed] the amount of cement added to the blocks."* CA App. at 1080, 1084 (emphasis added).[10] Although the Statement of Claims also mentioned peripheral factors such as "inadequate process controls and inadequate inspection procedures," it alleged that the reduction in cement was the *"major*

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[9] Finding on appeal that the record contained insufficient "specific and pertinent findings-of-fact" to "support a conclusion whether the required disclosure was or was not made," the Tenth Circuit remanded for the limited purpose of determining whether Stone "satisfied the pre-filing disclosure prong." Pet. App. 22-23a. On remand, the district court found that Stone had timely submitted the 1982 Engineering Order to the government, but also found that the Order was insufficient because it did not mention pondcrete. Pet. App. 72-74a. The Tenth Circuit held that its earlier statement—that the 1982 Engineering Order "was explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed"—bound the district court as law of the case. Pet. App. 51-52a.

[10] The evidence at trial demonstrated that in the winter of 1986—more than eight months after Stone left Rocky Flats—a new foreman took over pondcrete production and substantially reduced the average quantity of cement used in the mix. Tr. 980-82, 1002-03, 1041, 1108-09.

*contributor* to the existence of insufficiently solid pondcrete blocks"—and never mentioned the defective "piping" that Stone relied upon to establish his status as an original source. CA App. at 1080, 1084 (emphasis added).

Nor did Stone introduce any evidence of defects in the piping system at trial. Instead, the evidence centered on Rockwell's decision to reduce the amount of cement—conduct that was specifically discussed in newspaper articles upon which, *inter alia*, the district court relied in finding that Stone's action was based upon allegations that had been publicly disclosed.[11] The evidence established that sludge and cement were not mixed in the piping system Stone critiqued, but rather in a "pug mill" that was not installed until 1985—three years after Stone made his prediction. Tr. 983-85; CA App. 1661. Not only did plaintiffs tell the jury that reductions in the amount of cement used caused the solidification problem, Tr. 5079, 5128, 5135, 5144, 5161, they affirmatively told the jury that the pondcrete system itself was *not* the cause. In closing, the Government told the jury that the first foreman to manufacture pondcrete at Rocky Flats "was able to get concrete hard pondcrete blocks using the same methods" that later foremen "used with the exception of *one thing, and that is the reduction of cement.*" Tr. 5177. And Stone did not even contest Rockwell's assertion on appeal that Stone "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

3. As these facts make clear, the district court did not find that Stone had direct and independent knowledge of any false statements actually made by Rockwell. Nor did the Tenth Circuit purport to find any evidence in the record

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[11] Newspaper articles detailed not only the spill in 1988, but also the conclusion that "the ratio of concrete to waste was apparently altered," from "about 3.5 pounds of cement to 1 gallon of the sludge" to "closer to 1.8 pounds of cement to 1 gallon of sludge," thereby causing the spill. CA App. 889-38, 889-39, 889-40, 1342-45.

that Stone knew of the actual false statements—instead, the Tenth Circuit held as a matter of law that a relator need not know of "the actual act of fraud." Pet. App. 21a. And the record contained ample evidence that Stone did *not* know of any actual fraudulent statements. Plaintiffs told the jury that "the three years that are important to this case" were 1987-89—years when Stone never set foot inside Rocky Flats. Tr. 209; CA App. 0290-310; Pet. App. 3a. All of the environmental violations and concomitant false claims alleged by plaintiffs took place long after Stone's employment with Rocky Flats ended. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Although Stone asserted that Rockwell supervisors ordered him not to "discuss[] any environmental problems at Rocky Flats with the DOE," Pet. App. 19-20a, this statement was allegedly made in 1981—*six years* before the alleged concealments at issue in this case—at an isolated meeting with three individuals who appear to have had nothing to do with pondcrete (none of them was even mentioned at trial). Moreover, Stone admitted that he did not know of any documents containing false statements, nor of any persons who had concealed environmental issues or made false statements. CA App. 0225-26, 0230-31. When asked in his deposition for instances in which Rockwell misstated or concealed its compliance with environmental requirements, Stone described a single incident involving a cooling tower, and "[could not] remember any" others. CA App. 0230.

4. The district court also did not find that Stone had direct and independent knowledge that pondcrete blocks stored at Rocky Flats were actually insolid. Stone could not have known whether the pondcrete blocks stored at Rocky Flats between April 1987 and September 1988 were solid because he had left Rocky Flats before those blocks were manufactured. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Nor could he have known that Rockwell would use an inadequate ratio of concrete—the alleged cause of the insolid pondcrete—because that did not occur until there was a personnel change months after Stone's

departure. *Id.*; Tr. 1002-03, 1108-09. The Court of Appeals held that Stone satisfied the original source rule based on his prediction "that a defective pondcrete manufacturing process *would be* employed." Pet. App. 21a (emphasis added). And the Court of Appeals deemed "immaterial" the fact that Stone never even tried to prove at trial that his prediction was the actual cause of "solidity defects in the pondcrete blocks." *Id.*

5. The district court also made no finding that Stone proximately caused the Government's discovery of the alleged false claims. Nor did the Tenth Circuit. Although the Court of Appeals stated that Agent Lipsky used "information he had learned from Stone," Pet. App. 4a, to secure a search warrant, there was no evidence or finding that the information was central to the Government's discovery of the pondcrete problems. Agent Lipsky's 302 reports show that Stone focused on incineration charges, which Lipsky repeated in his affidavit. CA App. 145, 458, 461-62, 469, 778-87. The Government later determined that the incineration charges were meritless. CA App. 788, 803-04. And Lipsky relied far more heavily on information drawn from other informants, public records, and the Government's own independent investigations. *See* Lipsky Aff. ¶¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine (Nov. 10, 1997). Moreover, the record demonstrates that the Government did not, at the time, view Stone as a whistleblower. In a statement after the FBI raid, the United States Attorney who led the investigation said that the Rocky Flats case was unusual because "at no time ... did any knowledgeable 'insider' come forward." CA App. 0832. "Almost always," he explained, "someone eventually 'cracks' and steps forward to provide an 'insider's' cooperation. That simply did not happen here." *Id.* Instead, the Government discovered the facts through its own efforts, "stringing together thousands of documents to create inferences of criminality." *Id.* The day after the raid, newspapers reported that an unnamed DOJ source said "[n]o 'whistle blower' was involved" and "the investigation

didn't result from any 'single ... source.'" CA App. 0234. The DOJ attorney who led the plea bargain negotiations later told Congress that "candidly ... in the criminal investigation we found the information that [Stone] supplied to have very limited usefulness." Additional Record on Remand filed April 24, 2002, Tab 3(A), at 3[illegible].[12] In discovery, Stone identified 48 individuals with relevant knowledge, CA App. 1232-80, not one of whom testified at trial. Of the 55 witnesses who did testify, none even mentioned Stone's name.

**Proceedings On Appeal**

1. The Tenth Circuit affirmed, holding "that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete." Pet. App. 22a. The Tenth Circuit analyzed Section 3730(e)(4) as merely requiring relators to know facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint." Pet. App. 21a. The Tenth Circuit expressly held that a relator need not have direct and independent knowledge of "the actual submission of inaccurate claims." Pet. App. 21a. Moreover, the Tenth Circuit did not require that a relator have direct and independent knowledge of facts sufficient to prove that claims submitted by a defendant were inaccurate. Instead, the Tenth Circuit found that Stone qualified as an original source based merely on his prediction that Rockwell "*would be* using a defective process for manufacturing pondcrete," irrespective of whether the problem Stone

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[12] Although the Government advised the district court that it would "not challenge Mr. Stone's status pursuant to 31 U.S.C. § 3730(e)(4)," SA 26, it had previously advised the district court that Stone's statement of "all material evidence and information" in his possession was insufficient to demonstrate a viable FCA claim. CA App. 0903-04, 0913, 0916, 0920-21, 0923-37. In support of its motion to intervene, the Government advised the district court that discovery elicited by the Government in a separate action, principally testimony from other Rocky Flats employees "obtained [by the government] for the first time subsequent to March 1992," was what revealed an FCA claim. CA App. at 0926-32, 0936.

predicted "actually caused the production of malformed blocks." Pet. App. 21-22a (emphasis added).

Judge Briscoe concurred in part and dissented in part. Pet. App. 44a. Characterizing the majority's rule as requiring only "background knowledge," *id.*, she noted that "there is *no evidence* that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, *Stone was terminated from his employment with Rockwell well before either event occurred.*" *Id.* at 46a (emphasis added). And Stone's predictions were insufficient, in Judge Briscoe's view, because "it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the ... FCA claims. Rather, [those] claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began." *Id.* at 47a & n.2. As evidence of Stone's ignorance, Judge Briscoe pointed out that "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome." *Id.* at 48a. Because Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims, she concluded, he could not qualify as an original source. *Id.* at 47a.

2. With respect to Article II,[13] the Tenth Circuit reasoned that the Appointments Clause imposes only "procedural requirements" governing the appointment of officers, and that because Stone did not draw "a government salary" he was not an "officer." *Id.* at 24-26a. With respect to the Take Care Clause, the Tenth Circuit held that the Executive retains sufficient control to avoid constitutional infirmity where, as here, the Government was permitted to

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[13] Rockwell raised its Article II arguments in its Answer, CA App. 1460, and again in a motion to dismiss after the jury's verdict. CA App. 1459-71. In its motion, Rockwell sought dismissal of all of Stone's claims. CA App. 1460, 1471. The district court denied that motion in its entirety. Pet. App. 67a.

intervene. *Id.* at 26-29a.

3. Rockwell twice petitioned for rehearing *en banc*. In response to Rockwell's first petition, the panel granted rehearing and remanded for further fact finding. Pet. App. 49a. Rockwell's second petition was denied by an evenly divided vote, with Chief Judge Tacha, Judge Kelly, Judge Briscoe, Judge O'Brien, and Judge McConnell voting for *en banc*. Pet. App. 57a.

## REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision deepens an existing circuit split regarding the proper interpretation of the original source rule, conflicts with this Court's reading of similar statutory language, and effectively eviscerates the jurisdictional bar of Section 3730(e)(4). The statute expressly requires a relator to be the original source of the factual information on which the FCA allegations are "based." As this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993), when construing the same term in the Foreign Sovereign Immunities Act, the "basis" of an action refers to "the 'gravamen' of the complaint," meaning "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 356-57. And there can be no doubt that the "gravamen" of an FCA claim consists of allegations that the defendant knowingly made statements or claims that did not reflect the true state of affairs. *See, e.g.*, John T. Boese, 1 Civil False Claims and *Qui Tam* Actions § 2.03[B] (3d ed. 2006). An FCA claim accordingly could not possibly be "based" on the relator's information, within the ordinary meaning of that term, unless the relator had "direct and independent knowledge" of the false claims made by the defendant. In the Tenth Circuit, however, a relator need only know background information "underlying or supporting" the fraud allegation, and the relator's "information" can even be wrong and irrelevant. Pet. App. 21a. That view cannot be reconciled with *Nelson*, where this Court squarely rejected the view that a claim could be "based" on acts that only had some causal "connection with, or relation to" the elements of the

claim. 507 U.S. at 357-58. And it conflicts with the standards adopted by five other circuits. This Court should grant review to resolve a deep and well-developed circuit split, and to prevent an expansion of the *qui tam* provisions that is unsupported by the text of the FCA.

Independently, this Court should grant review to decide whether the *qui tam* provisions violate Article II of the Constitution. This Court reserved that question in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and it is time to resolve it. By vesting the authority to initiate and maintain litigation on behalf of the United States with a self-appointed relator, the FCA violates the Appointments Clause as construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). And by vesting such discretion in a relator whom the Executive cannot dismiss, the FCA violates the Take Care clause as construed by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988).

## I. THE TENTH CIRCUIT'S JUDGMENT DEEPENS AN EXISTING CIRCUIT SPLIT AND EFFECTIVELY EVISCERATES § 3730(e)(4)

### A. The Tenth Circuit's Interpretation Of The Governing Standard Conflicts With The Interpretations Adopted By The Third, Eighth, Ninth, Eleventh, And D.C. Circuits

The lower courts are in deep disarray on the question of how to define the nature and quantum of "knowledge" a *qui tam* relator must possess in order to qualify as an "original source" of the "information" that forms the "bas[is]" for the claims at issue. The Third and Eleventh Circuits require relators to know of an actual false statement to the Government. The Ninth Circuit requires relators to know of a false statement or at least to have been a proximate cause of the Government's discovery of a false statement. And the Eighth and D.C. Circuits require relators to know the actual facts that made a statement false. Stone would not have qualified as an original source in any of these circuits. But the Tenth Circuit only requires a relator to know

background information "underlying or supporting" his supposition that a defendant might have engaged in fraud, even if the relator pursues a different theory at trial.

1. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.), the Third Circuit held that an "original source" is one who knows of the alleged fraud. Mistick was a construction company that remediated lead-based paint pursuant to specifications issued by the Pittsburgh Housing Authority. *Id.* at 379. The Housing Authority's specification required use of a product called "Glid-Wall," manufactured by Glidden, to cover the lead paint. *Id.* Glidden, however, "had begun recommending against the use of [Glid-Wall] for this purpose some time earlier." *Id.* Mistick's *qui tam* action charged the Housing Authority with concealing this information from HUD, in order to procure additional remediation funds from HUD when Glid-Wall failed. *Id.* at 381-82.

Mistick was an insider for much of the relevant conduct. Mistick was the "general contractor for all of" the work at issue and company representatives attended a meeting with the Housing Authority when Glidden disclosed that Glid-Wall was unsuitable for this purpose. *Id.* at 379. Mistick also undertook its own independent investigation. *Id.* at 381. Nevertheless, the Third Circuit found that Mistick did not qualify as an original source because it did not know "that the Authority had made the alleged misrepresentations to HUD." *Id.* at 388. The Third Circuit held that, to be an "original source," a relator must have "'direct and independent knowledge' of the most critical element of its claims, *viz.*," the misrepresentation itself. *Id.* Construing a prior decision that held "'it is not necessary for a relator to have all the relevant information in order to qualify,'" the court concluded that "a relator cannot be said to have 'direct and independent knowledge of the information upon which [its fraud] allegations are based,' 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent

statements." *Id.* at 389 (quoting *United States ex rel Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir 1991)).[14]

The Eleventh Circuit has adopted a similar interpretation. In *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 564-65 (11th Cir. 1994), the *qui tam* relator charged that an insurance company systematically charged Medicare for claims that Medicare had no obligation to pay. The relator held a policy with Blue Cross, had himself been subject to the challenged practice and knew that his own medical bills had been forwarded to Medicare for payment in violation of the law. *Id.* at 564-65. The Eleventh Circuit held Cooper to be an original source because his "information is potentially specific, direct evidence of fraudulent activity." *Id.* at 568 n.12. The Eleventh Circuit distinguished Cooper from a relator who possessed mere "background information which enables him to understand the significance of a more general public disclosure." *Id.* (citing *Stinson*, 944 F.2d at 1160).

The Tenth Circuit's decision irreconcilably conflicts with *Mistick* and *Cooper*. The Tenth Circuit rejected as "flawed" Rockwell's argument that "a relator must have direct and independent knowledge of the *actual* fraudulent submission

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[14] Stone argued below that he would qualify as an original source in the Third Circuit under *Stinson*. *See, e.g.*, Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 45 (Mar. 17, 2000). *Mistick* demonstrates Stone's error. Moreover, *Stinson* made clear that a "relator must possess *substantive information about the particular fraud* rather than *merely background information* which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." 944 F.2d at 1160 (emphasis added). And district courts within the Third Circuit have applied *Mistick* and *Stinson* to disqualify relators who "have direct and independent knowledge of *some* of the elements of" their claim but not "the most critical elements." *See, e.g. United States ex rel. Waris v. Staff Builders, Inc.*, No. CIV. A. 96-1969, 1999 WL 788766 at *1-2, *8 (E.D. Pa. Oct. 4, 1999) (relator not original source, even though he saw false invoices and inferred they would be submitted for reimbursement by Medicare, because "the mere existence of a false invoice is insufficient to make out a claim of fraud").

to the government." Pet. App. 20a. While *Mistick* required a relator to know of "the allegedly fraudulent statements," 186 F.3d at 389, and *Cooper* requires "specific, direct evidence of fraudulent activity," 19 F.3d at 568 n.12, the Tenth Circuit held that a "relator need not ... have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge 'underlying or supporting' the fraud allegation is sufficient." Pet. App. 21a. And Stone could not have prevailed under *Mistick* or *Cooper*. As Judge Briscoe observed in dissent, "Stone lacked direct and independent knowledge of *any of the essential elements* of the" FCA claim. Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part). Stone at most had the "background information" that *Cooper* found inadequate.[15] "[T]here is no evidence" that Stone knew that Rockwell concealed pondcrete problems from DOE or claimed payment for environmental compliance it had not achieved. *Id.* at 46a. Indeed, *Stone left Rocky Flats before any such misrepresentations occurred. Id.* As Judge Briscoe noted, "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome of the" FCA claims, *id.* at 48a, and in fact Stone did not testify at trial nor was his 1982 Engineering Order introduced into evidence. Moreover, because Section

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[15] Stone argued below that his general knowledge of the DOE award fee process, coupled with a single incident in 1981 in which his Rockwell superiors told him not to discuss environmental problems with DOE, allowed him to infer that Rockwell submitted false claims to DOE in 1987-88. *See* Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 41-43, 47 (Mar. 17, 2000). The Tenth Circuit did not adopt this theory, and held that Stone did not need to know of "the actual submission of inaccurate claims by Rockwell to DOE." Pet. App. 21a. Stone's inference would not satisfy *Mistick* in any event. The relator in *Mistick* attended the meeting where Glidden told the government contractor that the specified product would fail, and Mistick knew that HUD was reimbursing lead paint remediation work. 186 F.3d at 379. The fact that the relator in *Mistick* could draw an inference that the product defects had not been disclosed to HUD was insufficient. And Stone's own knowledge fell far short of Mistick's.

3730(e)(4)(B) requires a relator both to know of *and to disclose* "the information on which the allegations are based," the Tenth Circuit diverged from the Third and Eleventh Circuits when it held that disclosure of Stone's 1982 Engineering Order sufficed to "carry Stone's burden" on voluntary disclosure. Pet. App. 52a. The Engineering Order nowhere identified or even predicted any fraudulent statements.

Stone's inability to direct the Government's attention to his pondcrete information further demonstrates his lack of sufficient knowledge. If Stone had understood the pondcrete issue at the time, he would have been able to explain it to Agent Lipsky, yet Agent Lipsky's 302s make no mention of pondcrete. Pet. App. 73a. Stone also would have been able to explain the significance of the engineering order—yet no evidence suggests he did so. *Id.* Stone, of course, bore the burden of proof to establish that he was an "original source." Pet. App. 12a.

2. The Ninth Circuit also requires a relator to have "firsthand knowledge of the alleged fraud." *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1998). The Ninth Circuit does not permit a relator to qualify merely based on "speculation or conjecture" that a defendant might have committed fraud. *Id.* at 526. Stone's prediction that the pondcrete design he reviewed would fail is precisely the sort of "speculation or conjecture" that does not suffice in the Ninth Circuit. *See* Pet. App. 47a (Briscoe, J. concurring in part, dissenting in part) (citing *Aflatooni* to demonstrate that "although Stone predicted that problems would occur with the production of pondcrete, and perhaps may have speculated that Rockwell would conceal any such problems from the government," he did not qualify as an original source). Stone conceded that he lacked direct and independent knowledge of fraudulent statements. CA App. 0225-26, 0230-31.

The Ninth Circuit recognizes a limited exception where a relator "trigger[s]" a Government investigation that uncovers the fraud. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1162

(9th Cir. 2001). A relator's status as an original source under this exception is governed by proximate cause concepts: "(1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations." *Id.* at 1163. In *Seal 1*, the Ninth Circuit disqualified a relator who triggered a government investigation because "others provided substantial assistance to the government along the way" and the Government itself "played a significant role in uncovering the allegations." *Id.* at 1163.

The very same analysis would have disqualified Stone. First, the Tenth Circuit did not apply the *Seal 1* factors and the district court did not—indeed, could not—make the findings necessary for Stone to prevail under *Seal 1*. Stone never proved that he triggered the investigation that uncovered the pondcrete problems—quite to the contrary, contemporaneous newspaper coverage showed that Rockwell reported its pondcrete spill, triggering a state and federal investigation. CA App. 889-38, 889-39, 889-40, 1342-45. Moreover, other private entities (Rockwell itself, local newspapers, and other unnamed informants) provided substantial assistance to the Government. And the Government played a significant role as well. *See* Additional Record on Remand at tab 3(A), filed April 24, 2002; CA App. 0832; Lipsky Aff. ¶ 1.4, 1.20, 6.3, 7.20-22, 8, *attached to* Defendant's Motion in Limine, Nov. 10, 1997. On such facts, *Seal 1* also would have barred Stone's claim had this case been litigated in the Ninth Circuit.

3. The D.C. and Eighth Circuits do not require relators to know of the fraudulent statements—instead, they only require knowledge of facts sufficient to show that statements made to the Government were false. In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 647 (D.C. Cir. 1994), the D.C. Circuit held that

an "original source" is one who has direct and independent knowledge of an essential element of the fraud. Quinn was an arbitrator, appointed by the National Mediation Board to resolve a labor dispute involving Springfield. Upon reviewing Quinn's time vouchers, Springfield realized that "Quinn had no arbitral function to perform on several of the days for which he sought pay." *Id.* Springfield brought a *qui tam* action, charging Quinn with false billing claims. *Id.* The D.C. Circuit interpreted the statutory language to require "direct and independent knowledge of" one of the "essential element[s] of the underlying fraud transaction.' *Id.* at 657. Applying that standard, the Court held that Springfield was an original source because it "had direct and independent knowledge of *essential* information" sufficient to establish the core element of falsity. *Id.*

The Eighth Circuit adopted the same interpretation of the statute in *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002). Anesthetists brought a *qui tam* claim, charging that anesthesiologists were improperly billing Medicare for work performed by anesthetists. *Id.* at 1050. The Eighth Circuit held that a relator must have "direct knowledge of the true state of the facts." The anesthetists qualified, because they had themselves performed the work for which the anesthesiologists billed, and had had directly observed "anesthesiologist[s] filling out forms used for billing." *Id.*

The standard adopted in this case irreconcilably conflicts with *Springfield* and *Nurse Anesthetists*. The Tenth Circuit did not even purport to find that Stone had direct knowledge of essential information sufficient to establish the element of falsity, as required in the D.C. and Eighth Circuits. That is precisely why Judge Briscoe dissented. *See* Pet. App. 47a (Stone "lacked direct and independent knowledge of any of the essential elements" of his FCA claims). As the Tenth Circuit's analysis makes plain, Stone's knowledge was hardly "essential" to the proof of his claims—the standard used to assess the sufficiency of knowledge in *Springfield*. 14 F.3d at 647. Indeed, the

majority did not quarrel with Judge Briscoe's observation that Stone's information "could have been omitted entirely at trial without affecting the outcome of the" FCA "claims." Pet. App. 48a. And the Tenth Circuit squarely held that Stone's speculation about design flaws in the pondcrete system was sufficient, regardless of whether those alleged flaws "actually caused the production of malformed pondcrete blocks." Pet. App. 22a. The Tenth Circuit's holding that Stone's production of his 1982 Engineering Order met his burden of voluntary disclosure, Pet. App. 52a, also conflicts with the law of the D.C. and Eighth Circuits. If a relator must *know* an "essential element of the underlying fraud transaction," *Springfield*, 14 F.3d at 657, then he also must adequately *disclose* an essential element. Stone did neither.

4. Instead of any of these approaches, the Tenth Circuit adopted a rule divorced from the statutory text that disserves the intended function of the original source rule. Congress sought to incentivize "whistle-blowing insiders with genuinely valuable information," *Springfield*, 14 F.3d at 649, *i.e.*, the "private individuals who are aware of fraud being perpetrated against the Government." H.R. Rep. No. 99-660, at 23 (1986). But the Tenth Circuit now permits relators to qualify without actually knowing of any fraud, or even having any *accurate* knowledge about the defendant's underlying conduct, Pet. App. 20-22a, and without disclosing information evidencing actual fraud or the true state of affairs at the time the statements were made. Pet. App. 52-53a. The statutory requirement that a relator must "have direct and independent knowledge of the information" that forms the "bas[is]" for the fraud claim cannot reasonably be read to allow relators to drain millions of dollars from the federal treasury based only on speculation about the future. In addition, the relator here was allowed to establish liability by relying on the facts that were publicly disclosed—the change in the cement/sludge ratio—even though Stone never even claimed to have direct and independent knowledge of those facts. Congress surely did

not intend to permit relators to rely on one set of facts to establish their status as an original source and then turn around and rely on different facts derived from public sources to prove their claim. Yet the Tenth Circuit's loose legal standard permitted that very type of bait and switch in this case.

Not only does the Tenth Circuit's rule allow relators to siphon away the Government's recovery, it also eviscerates Section 3730(e)(4)'s function as a bulwark against abusive *qui tam* lawsuits. *Qui tam* lawsuits are regularly brought by disgruntled ex-employees. Boese, 1 Civil False Claims and *Qui Tam* Actions § 4.01[B][2]. And "[m]ore and more *qui tam* cases are being brought by a defendant's competitor [or] employees of the defendant's competitors." *Id.* at § 4.01[B][3]. The potential for abuse in each situation is obvious. Properly construed, Section 3730(e)(4) would serve as a bar to abusive *qui tam* suits, by requiring relators to actually know about fraud. The Tenth Circuit's rule merely requires speculative beliefs "underlying or supporting" the view that fraud may have occurred. The Tenth Circuit's decision thus gives vindictive ex-employees or unscrupulous business competitors license to use the FCA, and a lawsuit in the name of the United States, merely "to gain a competitive advantage over the defendant." *Id.*

**B. There Is No Reason To Defer Review**

The issues presented here have been analyzed in the Courts of Appeals for over a decade, and clear conflicting positions have been staked out by the Third, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. This Court can thus interpret the original source rule with the benefit of considerable analysis from the courts below, a developed record, and with an awareness of the wide range of fact patterns to which the FCA and the original source rule can be applied. And the issues raised in this case strike at the very core of the original source rule. This Court recently denied a petition that focused solely on the meaning of the words "direct" and "independent" in Section 3730(e)(4)(B). *See, e.g., Comstock Res., Inc. v. Kennard*, 125 S. Ct. 2957

(2005). This case goes further, including the antecedent question of "*what* the relator must know firsthand." Brief for the United States as Amicus Curiae at 12-13, *Comstock Res., Inc. v. Kennard*, 543 U.S. 923 (2004) (No. 04-165) (emphasis in original). Analysis of the words "direct" and "independent" alone will be of limited significance because most if not all relators will have firsthand knowledge of *something* related to their claims.

Finally, further percolation promises only to increase confusion in the lower courts. Section 3730(e)(4) has given rise to at least two other circuit splits. The circuits are divided on the question of whether the phrase "the information on which the allegations are based" in Section 3730(e)(4)(B) refers to the allegations in the relator's complaint,[16] or the allegations in the public disclosure.[17] If this Court were to hold the latter, Stone would not qualify as an original source. *See* Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); CA App. 0889-38 to 40, 0892, 1343-45. The circuits are also split on the voluntary disclosure prong of Section 3730(e)(4)(B), with some holding that a relator must have been a source of information to the entity that made the public disclosure,[18] others holding that the relator must have provided his information to the

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16 *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Mistick*, 186 F.3d at 388-89; *United States v. Bank of Farmington*, 166 F.3d 853, 864-65 (7th Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir. 1993); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999).

17 *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (acknowledging circuit split); *United States ex rel. McKenzie v. BellSouth Telecoms.*, 123 F.3d 935, 943 (6th Cir. 1997); *Nurse Anesthetists*, 276 F.3d at 1048; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997).

18 *Dick*, 912 F.2d at 16 (2d Cir. 1990); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

Government prior to the public disclosure,[19] and still others holding that the relator need only disclose his information to the Government prior to filing his complaint.[20] In the process of resolving the question presented in this case, this Court would invariably provide guidance that would help clarify this confused body of law.

## II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTION RESERVED IN *STEVENS*—WHETHER THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT VIOLATE ARTICLE II

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), this Court reserved "the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take care' Clause of § 3." This case presents that question which this Court should grant review to resolve.

### A. The *Qui Tam* Provisions Of The False Claims Act Violate The Appointments Clause

Section 3730(b) authorizes *qui tam* relators to bring civil actions "for the United States Government." 31 U.S.C. § 3730(b). But in *Buckley v. Valeo*, 424 U.S. 1, 140 (1976), this Court unequivocally held that the Appointments Clause of the Constitution prohibits the vesting of "primary responsibility for conducting civil litigation ... for vindicating public rights" in persons not appointed in the manner prescribed by that Clause. The *qui tam* provisions of the FCA do precisely what *Buckley* forbids. Section 3730 provides that if the Government intervenes, "it shall have the primary responsibility for prosecuting the action." 31 U.S.C. § 3730 (c)(1). But, in every case, the statute vests in the relator "the right to conduct the action" unless and until the Government intervenes. 31 U.S.C. § 3730 (c)(3)

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[19] *McKenzie*, 123 F.3d at 942 (6th Cir. 1997); *Findley*, 105 F.3d at 690.

[20] *Bank of Farmington*, 166 F.3d at 865; *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1352 (4th Cir. 1994).

Assistant Attorney General William P. Barr determined in 1996 that these provisions "plainly violate the Appointments Clause." 42 Op. Off. Legal Counsel 207, 221 (1989) ("Barr Op."), *superseded by* 20 Op. Off. Legal Counsel 124 (1996) (Dellinger, W.). The Tenth Circuit disagreed, taking refuge in empty formalism by arguing that because relators do not collect a Government paycheck or receive the other benefits of office, they are not officers. Pet. App. 24-26a. That analysis directly contravenes *Buckley*, and strips the Appointments Clause of its structural significance.

In this case, Stone exercised primary responsibility for conducting civil litigation on behalf of the United States. He arrogated to himself the authority to file on behalf of the United States, without the advice and consent required by the Appointments Clause. Initiating *qui tam* suits can prematurely disclose criminal investigations, complicate plea agreements, cut off informal dispute resolution, and otherwise complicate the Executive's litigation strategy. *See* Barr Op. at 217. And here, the Government did not intervene for six years, leaving Stone with primary responsibility for the litigation for over half a decade. Pet. App. 6-8a. Even after intervening, the Executive expressly elected not to support Stone's plutonium claim—but Stone was permitted to pursue it nonetheless. *Id.* at 8-9a.[21] Moreover, even on their joint claims, Stone effectively led the litigation—deposing and examining almost half of the witnesses and driving the pre- and post-trial motions practice. Stone thus exercised the function of an officer of the United States.

The Tenth Circuit ignored these trenchant facts, reasoning that the Appointments Clause merely sets forth "procedural requirements" that "only apply to the appointment of officers." Pet. App. 25a. In so doing, the

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[21] Rockwell's Article II motion covered all of Stone's claim. CA App. 1460, 1471. The motion was denied *in toto*. Pet. App. 67a.

Tenth Circuit misinterpreted the governing law.[22] The Appointments Clause has a substantive role to play in "prevent[ing] congressional encroachment upon the Executive and Judicial Branches" and in "ensur[ing] public accountability." *Edmond v. United States*, 520 U.S. 651, 659-60 (1997). It "is more than a matter of 'etiquette or protocol'" but rather "is among the significant structural safeguards of the constitutional scheme." *Id.* at 659 (quoting *Buckley*, 424 U.S. at 125). The rationale for the Appointments Clause is not simply to make sure that federal salaries and benefits are not paid to the wrong parties—it is to protect the separation of powers and to ensure Government accountability by regulating who may exercise significant governmental authority. *See Buckley*, 424 U.S. at 126; *Edmond*, 520 U.S. at 659-62. The *qui tam* statute "allows Congress to circumvent" the check of an accountable Executive "and have its laws enforced directly by its own private bounty hunters." Barr Op. at 211.

Having recognized the obvious—that *qui tam* relators do not draw a federal paycheck—the Tenth Circuit was thus obliged to determine whether a relator was constitutionally permitted to prosecute FCA claims on behalf of the United States. Had it carried the analysis to its completion as required under *Buckley* and *Edmond*, the Tenth Circuit would have been compelled to hold that the FCA's *qui tam* provisions violate the Appointment Clause. Not only does the Tenth Circuit's decision directly conflict with *Buckley*, it invites end-runs around the Appointments Clause by the simple expedient of withholding federal paychecks and benefits from those to whom Congress purports to delegate

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[22] The Tenth Circuit's reliance on *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) stood *Buckley* on its head. *Germaine* and *Auffmordt* held that a person's status may be discerned by examining such factors as "tenure, duration, emolument, and duties." 99 U.S. at 511-12. But *Buckley* instructs that it *is precisely because relators are not officers* that they may not exercise "significant authority" to litigate on behalf of the United States. *Buckley*, 424 U.S. at 126, 140.

executive power. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 768 (5th Cir. 2001) (*en banc*) (Smith, J., dissenting). Other circuits have made the same error.[23] This Court should grant review to resolve the conflict with *Buckley* and *Edmond*, and to restore the integrity of the Appointments Clause.

### B. The *Qui Tam* Provisions Of The False Claims Act Violate The Take Care Clause

*Morrison v. Olson*, 487 U.S. 654 (1988), instructs that the President must retain substantial control over any person charged with executive functions. Like the Appointments Clause, the Take Care Clause serves the values of separation of powers and public accountability and prohibits Congress from insulating any aspect of executive authority from the President's control. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The touchstone inquiry is whether the Executive Branch retains "sufficient control over [the person] to ensure that the President is able to perform his constitutionally assigned duties." *Morrison*, 487 U.S. at 696. The *qui tam* provisions of the FCA violate these principles, creating "self-appointed 'ad hoc deputies' who are largely beyond the supervision of the United States and for whose actions the United States is not accountable." *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 869 (8th Cir. 1998) (Panner, J., dissenting). The Tenth Circuit, however, held that because the Executive was permitted to intervene (six years into the litigation), the Take Care Clause was satisfied. Pet. App. 26-27a.[24] In this respect, the Tenth Circuit's judgment conflicts with *Morrison*.

A *qui tam* relator exercises significant executive authority by initiating and maintaining litigation on behalf

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[23] *Riley*, 252 F.3d at 757–58; *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 n.21 (9th Cir. 1993).

[24] Three other circuits have also concluded that the *qui tam* provisions of the FCA comport with the Take Care Clause. *Riley*, 252 F.3d 749; *Taxpayers Against Fraud*, 41 F.3d 1032; *Kelly*, 9 F.3d 743.

of the United States. Initiating suit on behalf of the Unite States is entirely under the relator's control: the Executiv has no say in choosing the relator, in drafting the complaint in selecting the venue, or in deciding the appropriate time t file. *See* 31 U.S.C. § 3730(b)(1), (2). Such timing and tactica decisions, however, are core questions of prosecutoria discretion. *See* Barr. Op. at 217-18 (giving examples of case in which Executive was concretely injured by premature initiation of suit by *qui tam* relators); *see also Stinson*, 94 F.2d at 1164 (Scirica, J. dissenting). Under the FCA, a *qu tam* relator can act where the Executive has chosen not to with no duty to "follow Department of Justice ("DOJ" policies" and "no fiduciary or other duties to" the Unite States. *Riley*, 252 F.3d at 761–62 (Smith, J. dissenting).

If, as happened here for six years, the Government doe not intervene, then the relator retains unbridled discretio to make every litigation decision in his best interest without regard to the public interest. *See* 31 U.S.C § 3730(c)(3); *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939, 949 (1997) ("[Q]*ui tam* relators ar ... motivated primarily by monetary reward rather than th public good ... [and] are thus less likely ... to forego a action arguably based on mere technical noncompliance .. that involved no real harm to the public fisc."); Barr Op. a 220 (*qui tam* suits interfere with government contractin decisions); *id.* at 219 (relator incentivized to trad concessions on *qui tam* claims for concessions on hi personal claims, "since he receives only a fraction of an payment" made pursuant to *qui tam* claims).

Even where the Executive intervenes, the relato remains a party with autonomy to act contrary to th Executive's litigation strategy. *See* 31 U.S.C. § 3730(c)(1) *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 25–26 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290–91 (*qui tam* plaintiffs intended to act "as a check that the Governmen does not neglect evidence, cause undue delay, or drop a fals claims case without legitimate reason."). As the Bar Opinion noted, relators often exercise this power "in way

adverse to the government's interest." Barr. Opp. at 218. Here, Stone continued to press a claim the Executive disapproved. Pet. App. 8-9a. While the Executive may petition for restrictions on the relator, he cannot oust the relator altogether without dismissing the entire action. 31 U.S.C. § 3730(c)(1-2(A)); Barr Op. at 219. And the Executive may not prevent the relator from objecting to the settlement or dismissal of the complaint. *See* 31 U.S.C. § 3730(c)(2); Barr Op. at 219. These restrictions are far from trivial—in several reported cases, a relator's objections to a proposed settlement created enormous obstacles for the Executive to carry out its objectives. *See, e.g., United States ex rel. Coughlin v. IBM*, 992 F. Supp. 137, 142 (N.D.N.Y. 1998); *United States ex rel. Burr v. Blue Cross & Blue Shield of Fla., Inc.*, 882 F. Supp. 166, 169 (M.D. Fla. 1995). And in at least one instance, the Court rejected the Government's proposed settlement based upon the objections of the relator. *See Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988); Barr Op. at 219.

None of the features that saved the Ethics in Government Act are present here. The independent counsel provisions authorized the Government to remove counsel for "good cause," *see Morrison*, 487 U.S. at 696, whereas the FCA does not permit the Executive to remove a relator without dismissing the entire action. The decision whether to appoint an independent counsel was committed to the Attorney General's "unreviewable discretion," *see id.*, whereas a relator appoints himself without any obligation even to consult the Executive first. An independent counsel's jurisdiction was "defined with reference to the facts submitted by the Attorney General," *id.*, whereas the relator may assert any allegations he chooses and pursue any course in the litigation that he best sees fit. Finally, an independent counsel was required to abide by DOJ policies, *see id.*, whereas a relator is not.

These intrusions upon Executive authority are no accident. Congress candidly viewed *qui tam* actions as "a critically needed supplement—and prod—to Government

prosecution," where the Executive had "not done an acceptable job of prosecuting defense contractor fraud." 132 Cong. Rec. at H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman); *see also* S. Rep. No. 345 at 25–26. The Tenth Circuit's disposition of this issue conflicts with *Morrison* and this Court should grant review to resolve the constitutional issues it left open in *Stevens*.[25]

## CONCLUSION

The petition for certiorari should be granted.

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[25] The historical evidence considered by the *Stevens* majority as relevant to the Article III issue does not control the analysis here. Article III's reference to "cases" and "controversies" is understood to refer to actions "of the sort *traditionally amenable to, and resolved by the judicial process*," making history more relevant to the standing issue. *Id.* at 766 (emphasis added). The prosecutorial authority of the Executive branch is not similarly tied to a historical referent. Moreover, the "early *qui tam* statutes required a citizen to have suffered some private injury before he could sue on behalf of the government—unlike the FCA, which allows suit based solely on injury to the government." *Riley*, 252 F.3d at 773 & n.35 (Smith, J. dissenting) (collecting statutes). That distinction is more central to the Article II analysis than it was to standing, because bringing "suit based solely on injury to the government" is a defining characteristic of the Executive branch. *Buckley*, 424 U.S. at 140. In any event, as this Court has repeatedly held, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970); *see also Marsh v. Chambers*, 463 U.S. 783, 790 (1983); Barr Op. at 233-38 (history does not validate the *qui tam* provisions of the FCA).

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

UNITED STATES OF AMERICA, EX REL. JAMES S. STONE, AND UNITED STATES OF AMERICA,
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS,
v.
ROCKWELL INTERNATIONAL CORP., AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS-APPELLANTS AND CROSS-APPELLEES.
AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE, AMICI CURIAE.

NOS. 99-1351, 99-1352, 99-1353.

MARCH 4, 2002.

Before BRISCOE, HOLLOWAY and POLITZ,* Circuit Judges.

## ORDER ON REHEARING

HOLLOWAY, Circuit Judge.

The petition for rehearing en banc of Defendants-Appellants Rockwell International Corp. and Boeing North American, Inc., was circulated to the members of the panel and all circuit judges of the court in regular service. There having been no request for a poll on the suggestion of rehearing en banc, that suggestion is denied.

The petition for rehearing by the panel has been considered by the panel and it has been determined that rehearing is granted for the limited purpose of modifying the opinion and ordering a limited remand to the district court as provided herein. The limited remand to the district court is for the purpose of that court making findings of fact

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* The Honorable Henry A. Politz, United States Circuit Judge for the Fifth Circuit, sitting by designation.

and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith.

Upon completion of those proceedings, a supplemental record will be transmitted to this court containing the additional findings and conclusions made on this limited remand, and this court will otherwise retain jurisdiction of this cause. See *Penteco Corp. Limited Partnership v. Union Gas System, Inc.*, 929 F.2d 1519, 1522 (10th Cir. 1991). On all other issues except that requiring the additional factual findings and conclusions on the saltcrete, pondcrete and irrigation matters, the rulings made previously in our opinion are undisturbed. Upon receipt of the supplemental record of the proceedings below, final disposition of these appeals will be made.

The court's opinion as modified on rehearing by the panel is being filed along with this order.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**
**(D.C. NO. 89-M-1154)**

This appeal comes to us from the latest round of litigation arising from environmental violations that occurred during the 1980s at the Rocky Flats nuclear weapons plant ("Rocky Flats"), near Golden, Colorado. Previously, we considered related appeals in *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 94-634 (10th Cir.); *United States v. Rockwell Int'l Corp.*, No. 96-1530, 124 F.3d 1194 (10th Cir. 1997); *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 97-1015 (10th Cir.); *In re Special Grand Jury*, 143 F.3d 565 (10th Cir. 1998); *United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 98-1283 (10th Cir.); and *United States ex rel. Stone v. Rockwell Int'l Corp.*, 173 F.3d 757 (10th Cir. 1999). The instant appeal concerns False Claims Act claims, 31 U.S.C. § § 3729 *et seq.* (FCA), brought

by the Government and James S. Stone, a *qui tam* relator, against Rockwell International Corporation and Boeing North American, Inc. ("Rockwell"), as well as breach of contract and common law fraud claims brought by the Government alone. After careful consideration, on rehearing by the panel we make a limited remand for further findings and conclusions and affirm the remaining rulings.

I

From 1975 through 1989 Rockwell operated the Rocky Flats facility for the Department of Energy ("DOE") under a Management and Operating contract. Under this arrangement, Rockwell was compensated on a "cost-plus" fee basis, whereby Rockwell was reimbursed by DOE for "allowable costs" incurred in operating the plant and, once per year, received a "base fee" calculated at a pre-determined percentage of the overall value of the contract. In addition, the most significant portion of Rockwell's compensation for its management of Rocky Flats came in the form of an "award fee," a bonus paid every six months. The amount of this bonus was based on DOE's evaluation of Rockwell's performance in such areas as general management, production, and (critically for purposes of this appeal) environmental, safety and health operations.

James Stone began working at Rocky Flats as a Principal Engineer in the Facilities, Engineering and Construction Division, on November 10, 1980. He was promoted to the position of Lead Principal Engineer for Rocky Flats' Utility Design Department, Facilities Engineering Division, where he worked until March 1986, when he was laid off.

On June 25, 1987, after he had been laid off by Rockwell, Stone informed Special Agent Jon S. Lipsky of the Federal Bureau of Investigations about environmental crimes that had allegedly occurred at Rocky Flats during Stone's tenure there. Explaining to Agent Lipsky that he had had

"unlimited access" at Rocky Flats, Stone related a variety o allegations, including, *inter alia*, that contrary to publi knowledge, Rocky Flats accepted hazardous and nuclea waste from other DOE facilities; that Rockwell employee were "forbidden from discussing any controversies in fron of a DOE employee"; that although Rocky Flats' fluid bec incinerators failed testing in 1981, the pilot incinerato remained on line and was used to incinerate wastes daily since 1981, including plutonium wastes which were then sen out for burial; that Rockwell distilled and fractionate various oils and solvents although the wastes were geare for incineration; that Stone believed that the ground wate was contaminated from previous waste burial and lan application, and that hazardous waste lagoons tended t overflow during and after "a good rain," causing hazardou wastes to be discharged without first being treated. II App at 457-59.

Using the information he had learned from Stone, Agen Lipsky sought and received a search warrant to searc Rocky Flats. III App. at 778-787 (Lipsky Affidavit) Pursuant to this search warrant, on June 6, 1989, seventy five FBI and EPA agents conducted a search of Rocky Flats. Three days after Rocky Flats had been searched Agent Lipsky's affidavit was unsealed, prompting intens media coverage of the environmental violations allege therein. *See, e.g.*, Bruce Finley & Thomas Graf, "Rocky Flats illegally burned, dumped waste, U.S. claims," *Denve Post*, June 10, 1989; Sue Lindsay & Janet Day, "FBI: Flat burned waste secretly," *Rocky Mountain News*, June 10 1989.

Availing himself of the *qui tam* provision of the Fals Claims Act, 31 U.S.C. § 3730(b)(1) ("A person may bring civil action for a violation of section 3729 for the person an for the United States government. The action shall b brought in the name of the Government."), on July 5, 198 Stone filed the complaint that forms the basis for thi

appeal. The complaint, filed *in camera* and under seal, stated an FCA claim alleging that Rockwell, while managing Rocky Flats, concealed environmental, safety, and health problems from DOE throughout the 1980s. I App. at 81. It alleged that from at least as early as November 1980, Rockwell had been legally required to comply with certain federal and state regulations, statutes, laws, and agreements, including, *inter alia*: DOE Order 5483.1, as superseded by 5483.1A, for Occupational Safety and Health Program for Government Owned Contractor-Operated facilities; DOE Order 6430.1, the DOE General Design Criteria Manual, and DOE Order 5480.2; Colorado statutes, including Hazardous Substances, Colo.Rev.Stat. § § 25-5-501 *et seq.*, the Air Quality Control Program, Colo.Rev.Stat. § § 25-7-101 *et seq.*, Asbestos Control, Colo.Rev.Stat. § § 25-7-501 *et seq.*, the Colorado Hazardous Waste Act, Colo.Rev.Stat. § § 25-15-101 *et seq.*, the Water Quality Control Act, Colo.Rev.Stat. § § 25-8-201 *et seq.*, Radiation Control, Colo.Rev.Stat. § § 25-11-101 *et seq.*, Hazardous Substance Incidents, Colo.Rev.Stat. § § 29-22- 101 *et seq.*, and other specific provisions defining prohibited acts and reporting requirements with respect to hazardous substances, including, Colo.Rev.Stat. § § 25-5-503, 25-8-506 & 608, 25-15-08, 309, 310, 29-22-101 & 108; federal statutes, including the Occupational Safety and Health Act, 29 U.S.C. § § 651 *et seq.*, the Atomic Energy Act of 1954, as amended, 42 U.S.C. § § 2011 *et seq.*, the Energy Reorganization Act of 1974, 42 U.S.C. § § 5801 *et seq.*, the Water Pollution Prevention and Control Act, 33 U.S.C. § § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § § 7401 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. § § 6901 *et seq.*, the Safe Drinking Water Act, 42 U.S.C. § § 300f *et seq.*, and federal regulations applicable or enacted under these statutes. I App. at 87-89.

Stone alleged that Rockwell committed numerous violations of the above stated laws and regulations in

connection with its operation of Rocky Flats, and that "[i]n order to induce the government to make payments or approvals," Rockwell violated § 3729(a) of the FCA by, *inter alia*, knowingly presenting or causing to be presented to an officer or employee of the United States government, false and fraudulent claims for payment or approval, including requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-DOE contracts; and knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of these monies. I App. at 89-90.

In compliance with § 3730(b)(2) of the FCA, Stone filed his complaint in camera and provided to the Government a disclosure statement relating "substantially all material evidence and information" related to his claim in his possession. The relevant portions of this Disclosure Statement are discussed in Part II, *infra*. II App. at 491 (Plaintiff's Confidential Disclosure Statement of Material Evidence and Information). The United States, however, gave notice declining to intervene in the action, though it reserved the right to intervene at a later date upon a showing of good cause. I App. at 114-15.

While Stone's FCA claim was proceeding, in March 1992, in the culmination of a separate criminal investigation into Rockwell's management of Rocky Flats, Rockwell and the United States entered into a plea agreement under which Rockwell pled guilty to ten environmental violations. VI App. at 1861. Specifically, Rockwell's plea admitted knowing storage of mixed hazardous wastes (pondcrete and saltcrete), in violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d)(2)(C); knowing storage of mixed hazardous wastes (pondcrete and saltcrete) without a permit or interim status, in violation of the RCRA, 42 U.S.C. § 6928(d)(2)(A); knowing treatment and storage of mixed hazardous wastes (concentrated salt brine)

without a permit or interim status, in violation of RCRA, 42 U.S.C. § 6928(d)(2)(A); knowing storage of mixed hazardous wastes (vacuum filter sludge) without a permit or interim status, in violation of the RCRA, 42 U.S.C. § 6928(d)(2)(A); negligent violation of the Clean Water Act (CWA) permit conditions (industrial wastes to the sewage treatment plant), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of CWA permit conditions (BOD violations, March 1988), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of the CWA permit conditions (BOD/Fecal Coliform violations, April 1988), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A); negligent violation of CWA permit conditions (BOD violations, May 1988), in violation of 33 U.S.C. § 1319(c)(1)(A); knowing violation of CWA permit conditions (spray irrigation), in violation of the CWA, 33 U.S.C. § 1319(c)(2)(A); and negligent violation of CWA permit conditions (chromic acid spill), in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A). As part of its plea, Rockwell agreed to pay $18,500,000 in fines. VI App. at 1861-63.

The FCA specifies that courts lack jurisdiction over FCA claims based on public information unless "the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions...unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."). The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). In December 1992, Rockwell filed a motion to dismiss Stone's complaint for lack of subject matter

jurisdiction on the ground that Stone failed to satisfy the FCA's requirement that he be an "original source."

In response, on February 27, 1993, Stone submitted an additional affidavit and attached to it his original Disclosure Statement. We discuss the relevant portions of this affidavit in Part II, *infra*. On February 2, 1994 the trial judge denied Rockwell's motion to dismiss, finding that "Mr Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." IV App. at 893-96.

On November 14, 1995, the United States moved to intervene with respect to some, but not all of Stone's FCA allegations, and on November 19, 1996, the trial court granted the motion to intervene. IV App. at 900 (The Government's Motion For Leave to Intervene); *id.* at 964 (Memorandum Opinion and Order).

On December 20, 1996, in response to a suggestion from the trial judge,[1] the United States and Stone ("Plaintiffs") filed an amended complaint stating six counts against Rockwell. IV App. at 972. Count One stated a claim under the FCA, 31 U.S.C. § 3729(a)(1) & (2), brought by both the United States and Stone. IV App. at 995. Counts Two through Five stated claims for common law fraud, breach of contract, payment by mistake of fact, and unjust enrichment, and were brought by the United States alone. *Id.* at 996-1003. In Count Six, Stone (but not the United States), asserted an additional FCA claim alleging that Rockwell knowingly presented or caused to be presented to

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[1] After the United States intervened, the trial judge suggested that an amended complaint be filed to clarify the focus of the claims. Supp.App at 88-89 ("Now, I have noted, as already has been described, that there are sort of six areas, or the scope of claims that Mr. Stone has presently in the pleadings has six different areas of interest, whereas the government has talked about three apparently so far. So that's the stuff that needs clarification in the amended complaint....").

the Government false or fraudulent claims for money or property. *Id.* at 1004. The trial judge subsequently ordered that a separate trial be held on this claim. VI App. at 1621.

A jury trial was held on Counts One through Five. The main issue at trial was whether Rockwell concealed from DOE environmental, safety, and health problems related to the processing and storage of saltcrete and ponderete, two forms of processed toxic waste. Regarding the FCA claims, the jury was given a verdict form that asked it to answer the question: "Did the plaintiffs prove by a preponderance of the evidence that the defendant Rockwell International Corporation violated the False Claims Act to get one or more of the following claims under the Department of Energy Rockwell contracts paid or approved?" IV App. at 1119. The verdict form required the jury to answer that question for each of ten six-month periods, running from October 1, 1986, through December 30, 1989, each corresponding to an "Award Fee Period" or a period for which Rockwell received "Vouchers Accounting for Net Expenditures Accrued." *Id.* at 1119-20.

On April 1, 1999, the jury returned verdicts for Rockwell on the breach of contract claim and on seven of the ten FCA claims. However, the jury found for the Plaintiffs on the three remaining FCA claims and awarded $1,390,775.80 in damages. *Id.* After the jury verdict, when the Plaintiffs tendered a proposed form of judgment that included Stone as a party in whose favor judgment should be entered, Rockwell filed a post-trial memorandum arguing that Stone was not an "original source" for his amended FCA claims and thus was not entitled to judgment being entered in his favor or to recover attorney's fees and expenses. In response, the trial judge found that Stone was an original source.[2]

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[2] The trial judge noted, however, that Rockwell could appeal that determination; thus, when Stone filed motions seeking attorney's fees and expenses, the trial judge reserved ruling until after appeals on the

On May 13, 1999, the district court dismissed with prejudice the United States' claims for common law fraud, payment by mistake of fact, and unjust enrichment, his order stating:

> At a hearing held on May 7, 1999, based on all of the evidence received at trial, the court ruled that, as a matter of law, judgment should enter for the defendants on the equitable claims of the United States for unjust enrichment and recovery of payments made by mistake because the remedy would be inconsistent with the jury verdict for the defendants on the claim for breach of contract. The court also ruled that judgment should enter for defendants, as a matter of law, under Fed.R.Civ.P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

Accordingly, on June 10, 1999, the district court entered judgment in favor of the Plaintiffs on the three FCA claims in the amount of $4,172,327 (awarding three times the amount awarded by the jury pursuant to 31 U.S.C. § 3729(a)). The court also awarded the United States a $15,000 civil penalty. Although one of Stone's FCA claims against Rockwell had yet to be tried, the district court certified its judgment on the jury verdict under Fed.R.Civ.P. 54(b).

Rockwell then filed this appeal, arguing that: (1) the trial court erred in finding that Stone was an "original source" of the information on which his FCA allegations

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grounds that an appeal "may well affect the determination of these motions." VI App. at 1570 (Order Reserving Ruling On Motions For Fees and Expenses).

were based; (2) *qui tam* relators do not have standing under Article III of the U.S. Constitution; (3) the FCA's *qui tam* provisions violate the Take Care and Appointments Clauses of Article II of the Constitution; and (4) the trial court erred in instructing the jury that DOE employees' knowledge of the facts allegedly concealed from the DOE was relevant to the FCA claims only if such employees had "authority to act" under the Government's contracts with Rockwell. The Plaintiffs filed cross-appeals, Stone arguing that a new trial is required to award further damages under the FCA, and the Government arguing that: (1) the district court erred in failing to instruct the jury that Rockwell breached its contract with DOE; and (2) the district court erred in dismissing with prejudice its common law fraud action.

## II

### A

Rockwell's first claim of error is that the trial court erred in ruling that Stone was an "original source" of the information on which his FCA allegations were based.

The FCA specifies that courts do not have jurisdiction over claims based on publicly disclosed information "unless the action is brought by the Attorney General," or as applies here, "the person bringing the action is an *original source* of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).[3] An "original source" is defined as one who "has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* at § 3730(e)(4)(B). Rockwell challenges as error the district

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[3] 31 U.S.C. § 3730(e)(4)(A) provides in full:

No court shall have jurisdiction over an action under this section based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

court's determination (made by two judges, once in 1994 and again in 1999), that Stone was an "original source" of the information on which his FCA claims were based.

Because this involves a question of subject matter jurisdiction, we conduct our review *de novo*. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999) ("This court...reviews issues of subject matter jurisdiction *de novo*.") (citing *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992)). Since Rockwell has challenged the court's jurisdiction, the burden is on Stone to show, by a preponderance of the evidence, that jurisdiction exists. *Id.* Stone must therefore sustain "the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof." *Id.* (internal quotations omitted). "Mere conclusory allegations of jurisdiction are not enough." *Id.* (quoting *Penteco Corp. Ltd. Partnership v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)).

B

As an initial matter, we must consider Stone's contention that once the Government intervenes, as happened here, the trial court's jurisdiction is conclusively established and the original source requirement ceases to operate, on the theory that the case may proceed by virtue of the Government's presence in the litigation. We disagree. Intervention by the United States into a *qui tam* suit does not automatically endow the court with subject matter jurisdiction over both the claims by the United States and by the relator. We agree with the Fifth Circuit's persuasive analysis which rejected a relator's attempt "to end-run the 'original source' inquiry by arguing that the United States intervention in the action cured any jurisdictional defect.' That court held, and we agree, that in these circumstances

> [s]uch intervention does not.. confer subject matter jurisdiction over the relator's claims. Such a reading of the jurisdictional bar of 31 U.S.C. § 3730(e)(4)

> ignores the False Claims Act's goal of preventing parasitic suits based on information discovered by others. Indeed, under [plaintiff's] interpretation, the United States' intervention would cure the jurisdictional defects in all suits, even those brought by individuals who discovered the defendant's fraud by reading about it in the morning paper. The legislative history and policy behind the Act refute such a reading.

*Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995); *see also Eitel v. United States*, 242 F.3d 381 (9th Cir., 2000) ("Whether or not the government proceeds with this action [the relator] cannot because he is not an original source.").

Accordingly, we turn to the merits of whether Stone sufficiently demonstrated himself to be an original source of his allegations against Rockwell.

C

On two occasions Rockwell challenged Stone's status as an original source: first, in a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction in 1994, and then again in May 1999, after the jury had returned a verdict for the plaintiffs. Both times the court ruled that Stone was an original source.

On the first occasion the trial judge, Judge Carrigan, though acknowledging that Stone had conceded that he could identify neither the individuals who had allegedly falsely told the Government that Rockwell was in compliance with environmental, health, and safety laws, nor the specific documents containing these alleged misrepresentations, ruled that Stone nonetheless qualified as an original source. IV App. at 892-94 (Order at 3-4). Judge Carrigan based his ruling on his finding that Stone's duties at Rocky Flats included "plant-wide troubleshooting through which he gained knowledge of various environmental, health and safety problems," and that Stone

had been "informed that Rockwell's compensation was based on compliance with applicable environmental, health and safety regulations."[4] *Id.* at 893. Further, Judge Carrigan found that Stone had been instructed by Rockwell "not to divulge environmental, health and safety problems to the DOE." *Id.* Consequently, the judge ruled that given these findings,

> there is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. The fact that Mr. Stone was not aware of the specific persons or documents involved does not erase this knowledge.

*Id.* at 893-94. Accordingly, Judge Carrigan concluded that Stone possessed "direct and independent knowledge" of the information on which his allegations were based. Order at 4-5. Judge Carrigan denied Rockwell's motion to dismiss for lack of subject matter jurisdiction. *Id.* at 6-7.

In April 1999, a jury returned a verdict for plaintiffs on these claims of violation of the False Claims Act, awarding compensatory damages of $1,390,775 on those claims. The jury found for the defendant on the seven other False Claims Act claims and on the Government claim for breach of contract. The case was then before Chief Judge Matsch, and he adhered to Judge Carrigan's ruling that Stone was a proper *qui tam* relator and also to his rejection of the challenge to the constitutionality of he *qui tam* statute.

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[4] Judge Carrigan found that Stone had been given "a document stating that 'DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs,' including Nuclear Materials Management, Waste Management, Health Protection, Industrial Safety and Environmental Protection." Order at 4.

As noted, to qualify as an original source a relator must establish (1) that he possessed direct and independent knowledge of the information on which his claim is based, and (2) that he voluntarily conveyed the information to the Government prior to filing suit. 31 U.S.C. § 3730(e)(4)(B). Rockwell challenges the sufficiency of Stone's showing on both these requirements.

D

We have explained that for purposes of determining whether a relator qualifies as an original source, the FCA's direct and independent knowledge requirement is properly construed to mean that the knowledge possessed by the relator must be "marked by the absence of an intervening agency...[and] unmediated by anything but the relator's own labor." *United States ex rel. Hafter v. Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999) (quoting *United States v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996)) (alternations in original). In other words, "direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others," while independent knowledge means that "the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources." *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) (citation omitted).

*United States ex rel. Hafter v. Spectrum Emergency Care* is our most recent and fullest discussion of what is required for a relator to demonstrate direct and independent knowledge. *Hafter* concerned an appeal from the district court's grant of a motion to dismiss for lack of subject matter jurisdiction because the relator allegedly was not an original source. 190 F.3d at 1157-58. The relator had served as both an emergency room physician under an independent contract with Texas Emergency Room Services, P.A., an outside organization contracted to staff

the Emergency Room at the Dallas/Fort Worth Medical Center, and as a medical director responsible for supervising emergency room services and physicians. After the Medical Center had terminated Texas Services' contract, the relator's own contract with Texas Services was terminated. Soon thereafter, he was contacted by an attorney researching a medical malpractice case. During their interview, the relator told the attorney about alleged mismanagement of the emergency room, who then used this new information to amend his malpractice complaint to include alleged violations of the Texas Medical Practices Act.

Approximately one year after the filing of this suit, the relator filed his own *qui tam* suit alleging false and fraudulent Medicare, Medicaid and/or Champus reimbursement claims to the Government. When the defendant moved to dismiss for lack of subject matter jurisdiction, the district court ruled that because the information underlying his complaint had been publicly disclosed in the earlier suit brought by the attorney who had contacted the relator, the court could have jurisdiction only if the relator qualified as an original source. Finding that he failed to meet the dual requirements imposed on the relator, the district court granted the motion to dismiss.

On appeal, we focused our inquiry on determining whether the relator had the requisite direct and independent knowledge. We determined that the burden was on the relator to demonstrate that he had discovered the information on which his allegations were based through his "own efforts and not by the labors of others," and that his "information was not derivative of others." *Hafter*, 190 F.3d at 1162. On the facts presented by the relator, we held that he failed to satisfy this burden. We characterized his complaint, which merely stated that he had "direct and independent knowledge of the information upon which this suit is based," as stating only an "unsupported, conclusory

allegation" and ruled that it was insufficient to establish jurisdiction. *Id.* Likewise, we found that the relator's memorandum submitted in response to the motion to dismiss was equally deficient. Because a "mere assertion of knowledge, without adequate basis in fact and unsupported by competent proof is insufficient to establish jurisdiction," we held that such "equivocal statements" were inadequate to satisfy the direct and independent knowledge element for an original source. *Id.* at 1163 (citing *Wenz v. Memery Crystal*, 55 F.3d 1503, 1508-09 (10th Cir. 1995)).

Notwithstanding Rockwell's claim that Stone's evidence of his direct and independent knowledge is inadequate to satisfy the specificity we required in *Hafter*, we believe that Stone has adduced sufficient competent proof to establish that he had direct and independent knowledge of the information on which his FCA claim was based. Unlike in *Hafter*, where the relator could muster only a conclusory submission to the court that he had direct and independent knowledge which was devoid of specifics, here review of the record convinces us that Stone has been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste. Stone supplied the district court with an affidavit detailing his duties and responsibilities at Rocky Flats and describing his observations there that underpinned his FCA action. Stone averred that he commenced employment with Rockwell at Rocky Flats on November 10, 1980, as a Principal Engineer in the Facilities, Engineering and Construction Division, and that he was subsequently promoted to Lead Principal Engineer for Rocky Flats' Utility Design Department, Facilities Engineering Division, where he continued to serve until his employment was terminated on March 17, 1986. Stone averred that his duties at Rocky Flats included plant-wide

"troubleshooting" and reviewing designs and existing operations for safety and cost effectiveness. II App.at 291.

In this affidavit Stone further averred that in the course of his work at Rocky Flats, he was assigned to a project addressing the manufacturing process for pondcrete, a mixture of cement and sludge and liquid from evaporation ponds containing toxic industrial wastes. As part of his assignment, Stone averred that he "*studied aspects of the design proposed by Rockwell management for making pondcrete,*" *and that he "concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment.*"[5] *Id.* at 298 (emphasis added).

Stone's affidavit states that he communicated his concerns about the pondcrete manufacturing process to Rockwell's management in an October 13, 1982 "Engineering Order," which he attached as an exhibit to his affidavit. This Engineering Order was explicit in articulating his belief that the proposed design for making pondcrete was flawed: *"This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation ...."* *Id.* at 439 (Engineering Order). Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure.

Nor is Stone's affidavit the only document that establishes that he possessed direct and independent knowledge of alleged pondcrete manufacturing deficiencies. We also find it significant that Stone in a July 5, 1989, confidential disclosure statement provided to the Government detailed how he became aware of Rockwell's

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[5] Stone also averred that he had noted, based on his "knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous."

allegedly faulty process for manufacturing pondcrete. In a section of this statement entitled "Analysis of pondcrete method for drainage of solar evaporation ponds," Stone related:

> Solar evaporation ponds have, for some time, been used to treat...hazardous wastes. *Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds.* The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, *he immediately recognized that the design could not work and would lead to serious problems.* For example, the system was designed to remove sludge from the pond and mix that sludge with cement in order to create blocks of "pondcrete" for disposal use. *Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pondcrete" blocks would rapidly disintegrate thus creating additional contamination problems.*

II App. at 509 (Plaintiff's Confidential Disclosure Statement of Material Evidence and Information) (emphasis added).

Moreover in his disclosure statement Stone described how Rockwell forbade him from discussing any e[illegible]nmental problems at Rocky Flats with the DOE.

> [illegible] about September 1981, three managers, William Nichol, Sam Cerise and Robert Jensen, met with Mr. Stone regarding the communication with DOE. In that meeting, Mr. Nichol expressly told Mr. Stone that he did not want *any* government agency learning anything about problems or conditions that Mr. Stone may become aware of in connection with his employment at Rocky Flats. Mr. Nichol ordered

> Mr. Stone, in particular, not to communicate with the DOE regarding such matters, or with any government agency at all. Further, Mr. Stone was told that if he violated this gag order, he would be fired. Mr. Stone's request that this order be put in writing was refused.

*Id.* at 496 (emphasis added).

We believe that the information is sufficiently specific to satisfy the standard set out in the FCA and in our opinions. Stone clearly articulated in his affidavit and disclosure statement that he learned the facts underlying his claim by reviewing Rockwell's plans for producing pondcrete. We thus are convinced that he sufficiently alleged "specific facts–as opposed to mere conclusions–showing exactly how and when he...obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support[ed] those allegations with competent proof," and that this knowledge was discovered though his own labor. *Hafter*, 190 F.3d at 1162.

We are not persuaded by Rockwell's arguments to the contrary, which are permeated by a flawed understanding of the FCA's definition of direct and independent knowledge. The underlying assumption of Rockwell's arguments is that a relator must have direct and independent knowledge of the *actual* fraudulent submission to the government. Rockwell thus argues that to establish himself as an original source, Stone needed to have had direct and independent knowledge of the specific documents that informed DOE that Rocky Flats was in compliance with environmental, health and safety laws, as well as the specific individuals who submitted those inaccurate claims.

The plain text of the FCA, however, belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess "direct and independent knowledge of the *information on which the allegations are based.*" 31 U.S.C. § 3730(e)(4)(B). In *Hafter*,

we explained that the phrase "information on which the allegations are based" means "the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." *Hafter*, 190 F.3d at 1162 (emphasis added). We thus drew a distinction between the actual act of fraud, i.e. the actual submission of inaccurate claims by Rockwell to DOE, and the facts underlying or which give rise to the fraud, i.e. the environmental, health and safety violations themselves. The relator need not, as Rockwell says, have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge "underlying or supporting" the fraud allegation is sufficient. *Id.* Thus, we are persuaded that Stone's knowledge that a defective pondcrete manufacturing process would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information "underlying or supporting" his allegation concerning Rockwell's alleged ultimate fraudulent activity (the submission of claims to the DOE falsely stating that Rocky Flats was in compliance with environmental, health and safety laws).

For the same reasons, we are not persuaded by Rockwell's argument that Stone could not be an original source for the pondcrete claim because he no longer worked at Rocky Flats when the manufacture of pondcrete blocks commenced. The gravamen of Stone's claim is that he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete.

Nor do we find persuasive Rockwell's argument that Stone could not have had direct and independent knowledge of the information on which his pondcrete claim was based

because, Rockwell asserts, it is "preposterous" to think that the alleged defects in design Stone identified in his review of the designs later caused solidity defects in the pondcrete blocks. Appellant's Opening Brief at 37. Rockwell's objection does not carry weight; whether the alleged design flaws noted by Stone in his Engineering Report actually caused the production of malformed pondcrete blocks is immaterial. For a relator to be properly qualified as an original source, he must have had direct and independent knowledge of the information on which his claim is based. But whether that claim is ultimately flawed on the merits is an analytically distinct question from the one mandated by the FCA for establishing jurisdiction. It is for the finder of fact to determine whether the plaintiff's theory has merit; to satisfy the direct and independent prong of the original source test, the relator need only show that he possessed direct and independent knowledge of the information upon which his claim is based, not that his claim is factually correct.

Therefore, we hold that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete (which Rockwell concealed from the Government).

E

On reconsideration of the second prong of the original source test–which requires that Stone have voluntarily provided the information underlying his pondcrete claim, his saltcrete claim and his irrigation claim to the United States before filing suit–the court finds that the record does not reveal specific and pertinent findings-of-fact by either of the judges who considered the pre-filing disclosure issue to support a conclusion whether the required disclosure was or was not made. While there is considerable material in our record on this issue, this appellate court should not perform

the fact-finding function reserved for the district courts. *See Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999).

Accordingly, this court hereby directs that there be a limited remand to the district court for the purpose of findings and conclusions being made to ascertain whether the required pre-litigation disclosure to the Government was made, and for any further proceedings by any hearings that the district court shall find proper and necessary on this issue. We therefore make a limited remand for further proceedings in accord with this order, further findings, conclusions and a further ruling on the jurisdictional issue, which shall be certified as a supplemental record to this court; otherwise this court will retain jurisdiction of these appeals.

## III

Rockwell presents a number of constitutional challenges to *qui tam* actions under the FCA, arguing that *qui tam* relators lack Article III standing, that the FCA's *qui tam* provisions violate the Appointments Clause of Article II, and that they also violate the Take Care Clause of Article II. We review *de novo* challenges to the constitutionality of a statute. *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995).

### A
### Standing

Rockwell's challenge to the Article III standing of relators is easily disposed of. Recently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court held that relators do have standing to litigate *qui tam* claims. *Id.* at 1865 ("We think this history well nigh conclusive with respect to the question before us here: whether qui tam actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.' When combined with the

theoretical justification for relator standing...it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.") (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Therefore, we are obliged to reject Rockwell's contention that *qui tam* relators lack Article III standing.

The *Stevens* Court, however, was careful to specify that it was expressing no opinion concerning other constitutional challenges to *qui tam* actions, namely whether they violate the Take Care and Appointment Clauses of Article II. *Id.* at 1865 n. 8 ("[W]e express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."). Accordingly, we turn now to these remaining arguments.

**B**

**The Appointments Clause**

Rockwell argues that the FCA's *qui tam* provisions violate Article II's Appointments Clause, which states in part that the President shall nominate and "by and with the Advice and Consent of the Senate, shall appoint...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

By making this distinction, the Constitution establishes a bifurcated system of appointments: principal officers are appointed by the President with the "Advice and Consent of the Senate," while Congress may vest the appointment of "inferior Officers" in "the President alone, in Courts of Law, or in the Heads of Departments." *Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573, 137 L.Ed.2d 917 (quoting Article II). Rockwell suggests that the FCA's enforcement

scheme permits private relators to "appoint themselves as prosecutors" and thus runs afoul of the requirements of the Appointments Clause because, according to Rockwell, *Buckley v. Valeo*, 424 U.S. 1, 126, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), mandates that only a properly appointed "Officer of the United States" may conduct litigation on behalf of the United States, and that relators are not appointed by any of the sanctioned methods of appointing officers. Appellant's Opening Brief at 48.

We are not persuaded that *Buckley* suggests that we should find an Appointments Clause violation here. The procedural requirements of the Appointments Clause only apply to the appointment of officers. Thus, the threshold question that we face is whether *qui tam* relators are "officers" for purposes of Article II. We conclude that they are not; *qui tam* relators do not serve in any office of the United States. There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by the Supreme Court, that the definition of an officer "embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary." *United States v. Germaine*, 99 U.S. 508, 511-12, 25 L.Ed. 482 (1878); see also *Auffmordt v. Hedden*, 137 U.S. 310, 327, 11 S.Ct. 103, 34 L.Ed. 674 (1890) ("His position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an 'officer' within the meaning of the clause of the constitution referred to.").

We therefore conclude that Rockwell construes *Buckley* too broadly: that opinion held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2,

cl.2, of that Article." *Buckley*, 424 U.S. at 126, 96 S.Ct. 612. The Court was clear, however, that this definition of an officer of the United States should be construed in conformity with its prior *Germaine* and *Auffmordt* opinions, which the *Buckley* Court extensively quoted with approval. *Id.* at 124-25 & n. 162, 96 S.Ct. 612. Since *qui tam* relators do not meet these requirements, quoted *supra*, we, like the other circuits that have considered the question, hold that the FCA's *qui tam* provisions do not contravene the Appointments Clause. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir.2001) (en banc); *United States ex rel. Taxpayers Against Fraud v. General Electric Corp.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex. rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993).

C

**The Take Care Clause**

We now direct our attention to Rockwell's argument that the FCA's *qui tam* provisions violate Article II's Take Care Clause, which establishes that the Executive is the branch of government which "shall take Care that the laws be faithfully executed." U.S. Const., art. II, § 3. Rockwell contends that the FCA interferes with the Executive Branch's constitutionally assigned duty to enforce the nation's laws by conferring law enforcement powers on politically unaccountable private relators who are not subject to control by that Branch of the Government and who are motivated solely by private financial interests that may be inimical to the Government's interests. *See* Appellant's Opening Brief at 46.

On the facts of this case, we are not persuaded that a constitutional violation has occurred. Rockwell argues that the *qui tam* provisions run afoul of *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), which established that congressional action must leave the Executive Branch with sufficient "control" over its litigation so as to "ensure that the President is able to perform his

constitutionally assigned duties." *Morrison*, 487 U.S. at 696, 108 S.Ct. 2597. Rockwell contends that application of the FCA's *qui tam* provisions violate the Morrison test because the Executive has no power to remove the relator from the lawsuit (31 U.S.C. § 3730(c)(3)); the Executive cannot control the breadth of the relator's claims (31 U.S.C. § 3730(c)(3)); if the Executive seeks to intervene after initially declining to do so (as happened here) it may intervene only if the court finds "good cause" for such intervention, and even then the Executive cannot limit the relator's "status and rights" (31 U.S.C. § 3730(c)(3)); and if the Executive is allowed to intervene after initially declining to do so, it is barred from dismissing the relator's claims, and is thereby stripped of any power to terminate *qui tam* actions under those circumstances (31 U.S.C. § 3730(c)(3)).

We are not persuaded that in the circumstances of this case, the separation of powers, as embodied in the Take Care Clause, has been transgressed. The Government sought, and was granted permission, to intervene. Consequently, the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. Given that the Government was permitted to intervene, we remain unconvinced by Rockwell's contention that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities. *Morrison*, 487 U.S. at 695-96, 108 S.Ct. 2597.[6]

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[6] We express no opinion regarding whether the FCA's *qui tam* provisions violate the separation of powers or the Take Care Clause in circumstances other than those presented in this case, i.e. if the Government had sought permission to intervene, but was denied intervention by the district court, or if the Government desired to remove the relator from the action but was prevented from doing so by application of the statute.

Accordingly, we agree with the Fifth, Sixth, and Ninth Circuits, and hold that at least where the Government intervenes, the *qui tam* provisions of the FCA do not violate the separation of powers by transgression of the Take Care Clause. *Riley*, 252 F.3d at 753-57 ("[T]he *qui tam* portions of the FCA do not violate the constitutional doctrine of separation of power by impinging upon the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution."); *Taxpayers Against Fraud*, 41 F.3d at 1041 ("The *qui tam* provisions adopted by Congress do not contradict the constitutional principle of separation of powers."); *Boeing*, 9 F.3d at 755 ("[T]he Executive Branch exercises at least an equivalent amount of control over *qui tam* relators as it does over independent counsels. Thus, the FCA gives the Attorney General sufficient means of controlling or supervising relators to satisfy separation of powers concerns.") (footnote omitted).

We have examined relevant opinions of the Fifth, Sixth and Ninth Circuits and are persuaded that at least where the Government is permitted to intervene and does so, the *qui tam* provisions of the FCA do not violate the Take Care Clause provisions of Article II and their separation of powers principles. We have earlier discussed these decisions in Part II B in connection with the Appointments Clause and there held that the FCA *qui tam* provisions do not contravene that clause. We now focus on the Take Care Clause of Article II.

In *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753-57 (5th Cir.2001) (en banc), the Fifth Circuit upheld the FCA *qui tam* provisions against Take Care objections where the Government chooses to intervene and does so. Riley noted that the Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator, *id.*, including power to veto settlements for example. The Fifth Circuit concluded that the *qui tam* portions of the

FCA do not violate constitutional principles of separation of powers by impinging on the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution. 252 F.3d at 757.

The Sixth and Ninth Circuits expressed similar views. In *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994), a similar Take Care objection was made to the constitutionality of the FCA's *qui tam* provisions. The Sixth Circuit rejected the objections, agreeing with the Ninth Circuit's ruling in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994). The Sixth Circuit explained that the *qui tam* provisions do not contravene the constitutional principle of separation of powers; that the statute was crafted with particular care to maintain the primacy of the Executive Branch in prosecuting false-claims actions, even where the relator has initiated the process; and that indeed, if the Government decides not to intervene in a relator's case (which is not the case here) it may still require the relator to inform it of developments, among other things. Thus, the Sixth Circuit concluded that "the Executive Branch retains 'sufficient control' over the relator's conduct to insure that the President is able to perform his constitutionally assigned dut[y]." *Taxpayers*, 41 F.3d at 1041 (citing *Morrison v. Olson*, 487 U.S. 654, 696, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)).

In sum, we hold that the *qui tam* provisions of the FCA do not violate the Take Care Clause protective provisions of Article II in the circumstances of this case where the Government intervened.

IV

Both Stone and the Government argue that a new trial is required to award damages to compensate for costs incurred in the repair of damage caused by the faulty pondcrete blocks. They contend this is made necessary by the trial

court's erroneous refusal to grant their motion for a new trial on damages because the jury's damage award was improperly influenced by allegedly irrelevant and prejudicial testimony.

In his instructions to the jury, the trial judge charged that damages in the form of compensation for pondcrete repair costs should be awarded if they were incurred "because of" Rockwell's FCA violations. Plaintiffs contend that despite this instruction, the jury, though it found Rockwell liable, failed to compensate the Government for repair costs. Plaintiffs arrive at this conclusion from the fact that the jury award amounted to only $1,390,775.80 in damages–an amount exactly equal to ten percent of the fees paid by the Department of Energy to Rockwell during the period for which the jury found Rockwell liable. Plaintiffs contend that since during this relevant period "waste management" had a ten percent weight in the formula for calculating Rockwell's renumeration from the Department of Energy, the jury must have compensated the Government for its waste management fees only, and therefore wrongly excluded from its award the pondcrete repair costs.[7]

Plaintiffs argue that the jury's decision not to include pondcrete repair costs in its award of damages can only be explained by the jury having credited the "improperly admitted" testimony of defense expert witness Glen Sjoblom, who testified that the Department of Energy had reimbursed contractors for repair costs at other facilities. This testimony was improper, Plaintiffs maintain, because it addressed whether repair costs were reimbursable under the DOE-Rockwell contract, an issue that they contend is unrelated to the FCA claim and which the jury was not permitted to decide because "allowable" costs by contract

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[7] Plaintiffs maintain that Rockwell's own expert testified that if Rockwell were to be found liable, the Government would be entitled to at least $302,000 for pondcrete repair costs. IX App. at 4663.

are not non-recoverable as damages resulting from an FCA violation.

Plaintiffs' claim of error is predicated on the assumption that the jury calculated its award of damages in an impermissible manner. Our holding in *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 500-502 (10th Cir. 1983), however, establishes that such an assumption is not to be lightly made. In *Midwest*, we considered whether the district court should have granted a new trial based on a jury's award of damages in the amount of $3,911,637, a figure equaling the exact amount claimed by the plaintiff for "product shortage," a damage item that was contingent upon a finding that the defendant was liable on a counterclaim. However, even though the jury denied the counterclaim, it nonetheless awarded that exact amount. Despite this remarkable coincidence, we held that the defendant was not entitled to a new trial:

> While the likelihood of a coincidence in numbers may be very small, the possibility of the special attractiveness of $3,911,637 as a consciously selected damage award appears to us to be a distinct possibility. The jury had before it exhibit 104, which displayed a variety of numbers, including the $3,911,637 figure. Exhibit 104 also contained a damage figure for some of the state law claims which, when added with other figures of damage the jury could award, would come close to the $3,911,637 figure. The second plausible explanation is that the jury was confused.... The first explanation would require that we uphold the award, the second that we reverse and remand for a new trial.... Given this choice between a possible proper determination of a figure and a possible instance of jury confusion, we cannot freely exercise our own judgment as to the most plausible.... It is well settled that a verdict will

> not be upset on the basis of speculation as to the manner in which the jurors arrived at it.

*Id.* at 501.

The issue in *Midwest* is legally indistinguishable from the one presented here. Accordingly, we hold that the district court did not abuse its discretion in denying Plaintiffs' motion for a new trial.

V

The Government argues that the trial judge erred by dismissing with prejudice its claim for common law fraud. We note that during trial the judge expressed concern that the common law fraud claim could confuse the jury. VIII App. at 35, 70, Proceedings of March 16, 1999. On March 23, 1999, the Government moved to dismiss the fraud claim. IX App. at 4514. The Government's motion to dismiss was silent as to whether the dismissal would be with or without prejudice. However, in his Order for Entry of Final Judgment, the judge specified that the dismissal was with prejudice. *See* Order for Entry of Final Judgment Pursuant to Rule 54(b), at 2. The Government now argues that the court erred by dismissing the claim with prejudice.

We review the trial judge's dismissal with prejudice for an abuse of discretion. *Ohlander v. Larson*, 114 F.3d 1531, 1536-37 (10th Cir. 1997). Our review of the record convinces us that the trial judge did not abuse his discretion in stating the dismissal was with prejudice. Although the Government suggests that it was blind-sided by what it characterizes as a completely unexpected decision by the trial judge to dismiss the fraud claim with prejudice, we think the circumstances of the trial judge's ruling show otherwise.

On March 16, 1999, the fifteenth day of trial (the trial lasted twenty-five days), the trial judge informed counsel that he had decided not to submit the common law fraud claim to the jury because in his view the DOE's conduct made it ineligible for rescission, the remedy for fraud. The trial judge plainly told counsel: *"Well I'm not going to*

*submit that claim. I don't think this is a rescission case. I think they've waived that remedy by their conduct after they knew what they knew.*" VIII App. at 3569 (emphasis added).

Our review of the record convinces us that counsel for the Government recognized that the trial judge would not submit the fraud claim to the jury because counsel's response to the trial judge was to ask that before the judge made a formal ruling, the Government be permitted to brief the issue: "I think that we would like–I would ask that we be permitted to submit something in writing to Your Honor before you make a final...ruling on that." *Id.* at 3569-70. The trial judge granted the Government permission to do so. *Id.* at 3570. In this same exchange, the judge said he did not know "why you've got a common law fraud claim in this case. You're just confusing the case, and you're going to confuse the jury and that doesn't help you. But that's your call." VIII App. at 3570.

There is no indication in the record that the Government made any written submission. However, seven days later, on March 23, 1999, counsel for the Government announced in court that he was moving to dismiss the common law fraud claim. He stated: "I do have authorization from my office to move to dismiss the common law [fraud] claim, and I'm doing so." IX App. at 4514. Government counsel made no comment indicating that the dismissal was with or without prejudice. The judge accepted the Government's statement about dismissal, saying "All right," and adding, "So that it would be breach of contract and false claims...I think that will help in clarifying the issues," to which Rockwell's counsel agreed. *Id.*

On May 13, 1999, the judge entered an "Order For Entry Of Final Judgment Pursuant to Rule 54(b)." That order recited the returning of jury verdicts on April 1, 1999, for the plaintiffs on three FCA claims, findings for the defendant on the other seven FCA claims, and on the

Government's claim for breach of contract. The order further stated that the court

> also ruled that judgment should enter for the defendants, as a matter of law, under Fed.R.Civ.P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the Government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

Order at 1-2.[4]

We find no error in the judge's interpretation of the Government's oral motion to dismiss as abandoning the common law fraud claim. Rule 41(a)(2) provides that after a defendant has filed an answer, a plaintiff may voluntarily dismiss a claim only upon an order of the court. *Ohlander*, 114 F.3d at 1536-37. The rule also provides that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Fed.R.Civ.P. 41(a)(2). But a plaintiff may voluntarily dismiss his action "so long as the defendant is not hurt," and the court's consent to voluntary dismissal may be conditioned "upon such terms and conditions as the court deems proper." *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994) (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir. 1985)). Typically, "a court imposes as a term and condition of dismissal [without prejudice] that plaintiff pay the defendant the expenses he has incurred in defending the

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[4] Thus, the trial judge ruled first that judgment should be entered for Rockwell on the common law fraud claim as a matter of law under Fed.R.Civ.P. 50(a), and then alternatively that considering the oral motion to withdraw as a motion under Fed.R.Civ.P. 41(a)(2), the judge ordered that dismissal of the claim "must be with prejudice." See Order for Entry of Final Judgment, at 2. Because we hold that the trial court did not abuse its discretion in dismissing the claim with prejudice, we need not address whether the court erred in its Rule 50(a) ruling.

suit, which usually includes reasonable attorney's fees." *Marlow*, 19 F.3d at 303 (citing 5 Moore's Federal Practice, ¶ 41.06 at 41-81 to 41-86 (1993)).

The Government relies, *inter alia*, on *United States v. One Tract of Real Property*, 95 F.3d 422 (6th Cir. 1996), arguing that the trial judge was obliged to give notice to the plaintiff of his insistence that the dismissal be with prejudice so as to permit withdrawal of the motion to dismiss. *Id.* at 426. The Sixth Circuit noted three factors to be considered in determining whether a trial judge abused his discretion by a dismissal with prejudice "in response to a plaintiff's request for dismissal without prejudice." *Id.* at 425. Those factors were stated as: the judge giving notice of his intention to dismiss with prejudice; affording an opportunity to be heard in opposition to dismissal with prejudice; and giving the plaintiff an opportunity to withdraw the request for dismissal and proceed with the litigation. *Id.* at 425-26 (citing *Jaramillo v. Burkhart*, 59 F.3d 78 (8th Cir. 1995); *Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir. 1994); *Andes v. Versant Corp.*, 788 F.2d 1033 (4th Cir. 1986)). We are impressed by these factors and opinions, with which we do not disagree. However, on careful consideration of the record in this instant case, we are persuaded that we are presented with a materially different case.

Unlike *One Tract*, *Jaramillo*, *Marlow*, and *Andes*, in each of which the plaintiff said the dismissal would be without prejudice, in the instant case the Government made no such statement in its motion ("I do have authorization from my office to move to dismiss the common law [fraud] claim, and I'm doing so now," IX App. at 4514). On the other hand there was no statement the dismissal was with prejudice. We must therefore determine whether the judge abused his discretion, in the circumstances, by saying in the Order that "dismissal of the claim must be with prejudice." Order at 2.

In a similar controversy, the Seventh Circuit said the appellate court's task is to determine whether the interpretation by the trial judge was an abuse of discretion. *See Babcock v. McDaniel*, 148 F.3d 797, 799 (7th Cir. 1998) (where the plaintiff's motion to dismiss "did not speak to the issue of prejudice at all," the district judge was "required to interpret [the motion] one way or the other, and our task in reviewing the district court's decision is to determine whether the interpretation adopted by the district court was an abuse of discretion"). Given the context in which the Government's motion to dismiss was made here in proceedings on March 23, 1999 (IX App. at 4514), a week after the judge announced on March 16, 1999, that he was not going to submit the common law fraud claim to the jury (VIII App. at 3569), we are persuaded there was no abuse of discretion in ordering that the dismissal "must be with prejudice." Order at 2.

In these circumstances, we are persuaded that the judge did not abuse his discretion by providing that the dismissal must be with prejudice.

VI

To establish a violation of the FCA, the plaintiff must show that the defendant presented a claim to the Government knowing it was false or fraudulent. *United States ex rel. Aakhus v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998). The defendant, however, may be able to cast doubt on whether he "knowingly" submitted a false claim by showing that the Government itself was already aware of the facts underlying the FCA claim when the allegedly fraudulent claim was submitted. *United States ex rel Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326-27 (9th Cir. 1995).

Rockwell now claims that it tried to do this by presenting evidence purporting to show that certain mid and low-level DOE employees believed that Rockwell had not misled them. Rockwell thus argues that the trial judge

erred in his instructions on the intent requirement by instructing the jury that when assessing whether the plaintiffs had shown that Rockwell had "knowingly" submitted false claims, they should consider "all direct and circumstantial evidence, if any, concerning whether one or more government employees with authority to act under the Rockwell contracts with DOE knew the relevant facts concerning pondcrete, saltcrete and spray irrigation, and the costs incurred related to those activities." IX App. at 5294.

Rockwell claims that this instruction limited the pool of Government officials to DOE "contracting officers" only, and thus precluded the jury from considering any knowledge obtained by mid and lower-level DOE employees. Consequently, Rockwell contends that the jury was improperly prohibited from considering probative evidence that mid-level and lower-level DOE employees were aware of the information that Rockwell had allegedly concealed.[9] The instruction at issue is set out in the margin.[10]

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[9] Stone argues that we should not consider this challenge to the jury instructions because Rockwell did not object to the proposed instruction at trial and thus did not preserve the issue for appellate review. We do not agree, and are convinced that the issue was properly preserved.

[10] After informing the jury that in order for Rockwell to be liable for a FCA violation, the plaintiffs must establish that "Rockwell knew that the statements it made or used or caused to be made or used were false," the judge instructed the jury that Defendant claims that the government, through various employees of the Department of Energy, had prior knowledge of facts relating to the false statements that defendant allegedly made concerning pondcrete, saltcrete and spray irrigation operations at Rocky Flats. The government denies the existence of such prior knowledge. In considering whether Rockwell knowingly made any false statements, you must consider all direct and circumstantial evidence, if any, concerning whether one or more government employees with authority to act under the Rockwell contracts with DOE knew the relevant facts concerning pondcrete, saltcrete and spray irrigation, and the costs incurred relating to those activities.

Government knowledge may negate the intent by defendant required to establish a violation of the False Claims Act. If you find that government employees with authority to act under the contracts knew the relevant facts, then you may consider it in determining whether

We conduct our review *de novo* to determine whether, as a whole, the jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards. *Brown v. Gray*, 227 F.3d 1278, 1291 (10th Cir. 2000) (citing *United States v. Jackson*, 213 F.3d 1269, 1290 (10th Cir. 2000)).

We are convinced that the judge's jury instructions on the intent requirement were not in error. Notwithstanding Rockwell's assertions to the contrary, the trial judge did not instruct the jury that they could only consider the knowledge of the DOE's "contracting officers." Rather, the judge worded his instructions broadly, charging the jury that they could consider the knowledge of all "government employees with authority to act under the contract." Thus, it is clear from the plain language of the instructions that the judge did not limit the relevant pool of DOE employees to "contracting officers"; nor has Rockwell articulated any argument that persuades us that the phrase "government employees with authority to act under the contract" is synonymous with "contracting officers."[11] Consequently, there is nothing in the instructions indicating that the jury was under the impression that they were prohibited from considering Rockwell's evidence that mid and lower-level DOE employees knew of the environmental, health and safety violations at Rocky Flats.

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Rockwell knowingly presented a false statement as to those facts. IX App. at 5292-94.

[11] Indeed, the contract between Rockwell and the DOE defines a "Contracting Officer" as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer." VI App. at 1669. Thus, the phrase "government employees with authority to act under the contract" appears to encompass a broader range of individuals than does the contract's quite narrow definition of a "Contracting Officer."

Accordingly, we hold that the trial judge did not err in his jury instructions on the intent requirement.[12]

VII

The Government's breach of contract theory was based on the argument that Rockwell's failure to operate the Rocky Flats facility in compliance with applicable environmental laws represented a breach of contract. To this end, the trial judge instructed the jury:

> The government also alleges that defendant breached the DOE/Rockwell contract through operational failures relating to defendant's production, handling and storage of pondcrete and saltcrete at Rocky Flats. Defendant denies the government's allegations.
>
> For the government to recover on its claim for breach of express contract relating to alleged operational failures, you must find the government has proven all of the following by a preponderance of the evidence.
>
> One, *defendant failed to use its best efforts* in its production, handling or storage of pondcrete and saltcrete.
>
> Two, *such operational failures resulted from willful misconduct or lack of good faith on the part of the plant manager, Mr. Sanchini, or those Rockwell*

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[12] We are convinced that our decision is consistent with the Ninth Circuit's opinion in *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995), which Rockwell relies upon. *Butler* rejected the argument that for purposes of determining whether the defendant "knowingly" submitted a false claim to the Government, only contracting officers' knowledge is relevant. Instead, the court held that the knowledge of government "technical representatives" may also be considered.

Because, as discussed above, we find no evidence in the instant case that the jury was instructed to restrict their consideration exclusively to contracting officers, there is no contradiction between *Butler* and our holding here.

> *managerial employees responsible to Mr. Sanchini, thereby breaching the contract.*
>
> And, three, resulting damage to the government caused by the breach of contract.

IX App. at 5299-300 (emphasis added).

Then, the judge re-emphasized to the jury that it could not find Rockwell liable if it found that Rockwell had used its "best efforts" to comply with its obligations under the contract:

> Under the terms of both the 1986 and 1989 DOE/Rockwell contracts, defendant was obliged only to use its best efforts to comply with its responsibilities under the contract. *If the defendant used its best efforts to perform its contractual obligations, then defendant was entitled to receive or retain its costs for what it did in relation to the contract,* and the government may not recover on its claim for breach of contract, despite the failure, if any, of defendant to meet the contractual requirements.

*Id.* at 5300 (emphasis added).

The Government now argues that the district court erred both by instructing the jury on "best efforts" and by failing to instruct the jury to find Rockwell liable for breach of contract. It contends that because Rockwell's contract with DOE imposed a duty on Rockwell to comply with all applicable environmental laws, including the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, Rockwell's guilty plea to violations of that statute conclusively establishes that it breached its duties under the contract and that it could not re-litigate that issue.[13] *See*

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[13] For its argument in the nature of collateral estoppel, the Government points to the "Plea Agreement and Statement of Factual Basis" entered in *United States v. Rockwell Int'l Corp.*, No. 92-CR-107, District of Colorado, a document which was admitted in evidence in the instant civil action as Plaintiff's Ex. 1. VI App. at 1861-92.

Reply Br. for Appellee/Cross Appellant the United States, at 6 (citing *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)). The Government thus argues that the judge "improperly added an intent requirement to the elements of a breach of contract claim" and should have instructed the jury to find that Rockwell breached its contract with DOE.

We are persuaded that the judge did not err in his instructions. We are convinced that both the text of the contracts and relevant case law establish that the "best efforts" instruction was correct. In the section of the contracts entitled "Scope of Work," it was provided:

> The Contractor shall, in accordance with the provisions of this contract, *use its best efforts* to manage, staff, maintain, and operate the Rocky Flats Plant within available funds so as to carry on in an efficient manner all necessary and related services and operations for the purpose of developing and producing (at such rates, and in conformance with such specifications, as the Contracting Officer may direct in writing from time to time) weapons components, assemblies, and ancillary equipment and for performing related services and operations within the time scales requested by the Contracting Officer.

VI App. at 1708 (Appendix B to Contract, at 1) (emphasis added).

We are convinced that this language resolves the question of whether the judge was correct in instructing the jury that Rockwell owed to the DOE only its "best efforts." Moreover, our review of relevant case law confirms that the trial judge did not err in his instructions on this point. For instance, *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295 (1997), involved an action brought in the United States Court of Federal Claims by defense contractors for equitable adjustment and conversion of termination for default, to one for convenience of the Government. *Id.* In

determining the rights of the contractors and the Government, the trial judge said that the "best efforts" standard summarizes the basic nature of the cost-reimbursement contract, and that such a contract merely requires the contractor to use its best efforts to provide the goods or services at the stated price. *Id.* at 298 (citing *General Dynamics Corp. v. United States*, 229 Ct.Cl. 399, 671 F.2d 474 (1982)). The judge concluded that "[i]f, despite its best efforts, the contractor cannot meet its contractual requirements, the government has obtained precisely what it bargained for, namely the contractor's best efforts...." *McDonnell Douglas*, 37 Fed. Cl. at 298.

Although the Government, in developing its collateral estoppel theory, relies on *Sell v. United States*, 336 F.2d 467, 475 (10th Cir. 1964), and *United States v. Rivera Ramos*, 856 F.2d 420, 420 (1st Cir. 1988), *cert. denied*, 493 U.S. 837, 110 S.Ct. 118, 107 L.Ed.2d 79 (1989), we are not persuaded. In *Sell*, this court stated that findings in a criminal case were admissible in the civil case at issue under res judicata or estoppel by judgment principles, "*insofar as such findings determined issues identical to both cases.*" *Sell*, 336 F.2d at 475 (emphasis added, footnote omitted). We feel, however, that the issue of fact about making "best efforts" here to comply with the contractual duty is not the same as the fact issues determined by the guilty plea in the criminal case. Consequently, although Rockwell did previously plead guilty to violating the Resource Conservation and Recovery Act,[14] we are convinced that this plea did not, as the Government contends, preclude the jury from finding that

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[14] Specifically, in Count One of the plea agreement, Rockwell pleaded guilty to "Knowing Storage Of Mixed Hazardous Wastes (Pondcrete and Saltcrete) in Violation of RCRA Requirements, 42 U.S.C. § 6928(d)(2)(C)"; and in Count Two, Rockwell pleaded guilty to "Knowing Storage Of Mixed Hazardous Wastes (Pondcrete and Saltcrete) without a Permit or Interim Status, in Violation of RCRA, 42 U.S.C. § 6928(d)(2)(A)." *See* note 17, *supra*.

Rockwell engaged in its best efforts and thus that it complied with its obligations under the contract.

After careful consideration of this issue, we are of the opinion that a reasonable jury could find (and in this case, did find) that a defendant who violated applicable laws nonetheless used its best efforts to fulfill its obligations under the contract, and thus find that no breach occurred.[16] Accordingly, we hold that the trial judge did not err by not instructing the jury to find that Rockwell breached its contract with the DOE.

## VIII

In sum, we are persuaded that the rulings of the district court should be affirmed on all issues except the issue of pre-filing disclosure discussed in Part II E. As to that issue only, the cause is remanded to the district court for the limited purpose of determining whether Mr. Stone satisfied the pre-filing disclosure prong of the "original source" test in compliance with the statute which requires the *qui tam* relator to have voluntarily provided the information before filing suit. *See United States ex rel. King v. Hillcrest Health Center*, 264 F.3d 1271, 1280 (10th Cir.2001).

As the Supreme Court made clear in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), *qui tam* relators do not lack Article III standing. The FCA's *qui tam* provisions do not violate Article II's Appointments Clause, nor its Take Care Clause, at least where the Government intervenes. The court did not abuse its discretion in denying the Plaintiffs' motion for a new trial for damages. Nor did it abuse its discretion in providing that the Government's dismissal of its common law fraud claim must be with prejudice. Finally, the court did not err in its jury instructions concerning either the knowledge of DOE

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[16] Of course, a jury could also find that the defendant did not use its best efforts, and thus that it breached its contract.

officials or whether the contract obligated Rockwell only to use its "best efforts."

Accordingly, we **affirm in part and remand for the limited purposes we note.** This court will retain jurisdiction of these appeals pending the district court's proceedings and further ruling on the pre-filing disclosure requirement, following which a supplemental record shall be certified to this court for final disposition.

If the trial judge finds there was no proper pre-litigation disclosure to the Government by Stone, the judgment for the Government will be modified as the statute requires and the judgment for Stone vacated. If the judge finds there was proper disclosure by Stone to the Government, the judgment for Stone and the Government will stand. This court retains jurisdiction to make its final disposition after review of the supplemental record.

IT IS SO ORDERED.

BRISCOE, Circuit Judge, concurring and dissenting.

I agree with the majority's resolution of every issue except for its conclusion that James Stone qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B). In my view, Stone has established only that he had direct and independent knowledge of background information pertaining to Rockwell's pondcrete operations, and thus fails to qualify as an "original source" under § 3730(e)(4)(B).

The False Claims Act defines the term "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). We have further defined both the type and kind of knowledge that an original source/relator must have. In *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999), we held that to satisfy the "direct and independent knowledge" requirement, a relator must

offer more than "secondhand information, speculation, background information or collateral research." Instead, we held, the relator "must allege specific facts...showing exactly how and when he or she obtained direct and independent knowledge of the *fraudulent acts alleged in the complaint* and support those allegations with competent proof." *Id.* at 1162 (emphasis added). We recently reaffirmed the type and kind of knowledge required of a relator in *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271 (10th Cir. 2001), emphasizing that the phrase "information on which the allegations are based" refers to "*any* essential element of the [underlying] fraud transaction." *Id.* at 1280 (internal quotations omitted).

Count One of the amended complaint, asserted jointly by the United States and Stone, alleged that Rockwell violated the FCA by "knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property." App. at 995. Count One focused on three separate environmental, safety and health violations which Rockwell allegedly concealed from the government. The jury ruled in favor of Stone and the government on one of the three claims in Count One. The jury concluded Rockwell had submitted false claims to the DOE in violation of the Act as regards its pondcrete and saltcrete operations and awarded damages.

The question before us is whether Stone qualifies as an "original source" with respect to the portion of the Count One FCA claims upon which he and the government prevailed at trial. Those prevailing claims focused on Rockwell's submission to the DOE of false statements regarding its pondcrete and saltcrete operations between April 1, 1987 and September 30, 1988. As outlined above, Stone must demonstrate, in part, that he had direct and

independent knowledge of one or more of the essential elements of those claims.[1]

It is undisputed that Stone possessed significant background information regarding Rockwell's pondcrete operations. According to Stone, managers at the Rocky Flats facility began considering the idea of producing pondcrete, in order to dispose of sludge from the facility's solar ponds, in the fall of 1982. At that time, Stone was assigned the task of studying "aspects of the design proposed by Rockwell management for making pondcrete." App. at 298. "After careful study, [he] concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment." *Id.* Stone communicated his concerns to Rockwell management in a written memo. *Id.* at 298, 439 ("This design will not work, in my opinion."). According to Stone, Rockwell management nevertheless "went forward with the project without making the changes necessary...to eliminate the instability of the pondcrete blocks." *Id.* at 299.

Notwithstanding Stone's background knowledge, there is no evidence that he directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, Stone was terminated from his employment with Rockwell well before either event occurred. Thus, although Stone predicted that

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[1] I note the first claim in Stone's initial complaint, filed July 5, 1989, was much broader than Count One of the amended complaint upon which Stone and the government ultimately prevailed. Judge Carrigan's ruling that Stone was a relator under the FCA pertained to Stone's initial complaint. Our focus in this appeal is on Count One of the amended complaint and whether Stone is a relator as regards those claims. See *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1164 n. 10 (10th Cir. 1999).

problems would occur with the production of pondcrete,[2] and perhaps may have speculated that Rockwell would conceal any such problems from the government, it is apparent that he lacked the "direct and independent" knowledge required by the FCA's "original source" provisions. *Cf. United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 163 F.3d 516, 526 (9th Cir. 1999) (concluding relator who offered only speculation and conjecture that defendant committed the alleged fraud did not qualify as an original source); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (concluding that plaintiff, who performed collateral research and possessed background information which enabled him to understand the significance of publicly disclosed information, did not qualify as an original source). More specifically, Stone lacked direct and independent knowledge of any of the essential elements of the Count One claims, i.e., that Rockwell actually experienced problems in its production of pondcrete, that Rockwell failed to disclose those problems to the government and in fact represented to the government that there were no environmental problems at Rocky Flats, or that Rockwell knowingly concealed the true state of affairs in order to obtain benefits under its contract with the government. *See United States v. Mackby*, 261 F.3d 821, 826 (9th Cir.2001) (concluding that the government must prove three elements to establish a cause of action under the FCA:

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[2] The majority suggests that, in light of the conclusions reached by Stone in 1982, Rockwell was "aware[ ] that it would be using a defective process for manufacturing pondcrete." Maj. Op. at 802. I think this stretches the evidence too far. Although Rockwell was clearly aware of Stone's opinions, it is entirely plausible that Rockwell management nevertheless believed the proposed pondcrete manufacturing process would work. In any event, it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the Count One FCA claims. Rather, the Count One FCA claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began.

(1) a "false or fraudulent" claim, (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval, and (3) with knowledge that the claim was false). This conclusion is made clear when one considers that the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome of the Count One FCA claims.

Because I conclude that Stone cannot qualify as an "original source" with respect to the successful Count One FCA claims, I would reverse the judgment of the district court and remand the case with directions to dismiss Stone's portion of the Count One FCA claims for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.
UNITED STATES OF AMERICA, EX REL. JAMES S. STONE, AND UNITED STATES OF AMERICA,
PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS,
v.
ROCKWELL INTERNATIONAL CORP., AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS-APPELLANTS AND CROSS-APPELLEES.
AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE, AMICI CURIAE.
Nos. 99-1351, 99-1352, 99-1353.

March 5, 2004.

Before BRISCOE, HOLLOWAY and HARTZ,* Circuit Judges.

ORDER AND JUDGMENT**

HOLLOWAY, Circuit Judge.

ORDER AFTER LIMITED REMAND

The disposition of the instant appeals by published opinion for a divided panel was suspended on petition for rehearing, and the panel ordered a limited remand for findings and conclusions to ascertain whether the Relator, Mr. Stone, had satisfied the statutory requirement[1] of disclosing the information underlying his claims to the government prior to bringing this lawsuit. Our opinion, as modified on rehearing, is reported. *United States, ex rel.*

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* Judge Hartz has replaced the late Judge Politz on the panel.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] *See* 31 U.S.C. § 3730(e)(4).

*Stone v. Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002). We will not attempt to summarize in this order the complex factual and legal background of this matter which is outlined in that opinion.

To proceed in accord with our remand order, the district court first received submissions from the parties consisting of motions supported by briefs, excerpts from the record, and additional material submitted by defendant Rockwell. The court then held a hearing on November 25, 2002, at which all counsel agreed that the record was adequate to enable the judge to make the findings and conclusions necessary. The judge made his findings and conclusions shortly after the hearing, addressing Mr. Stone's claims in three areas: pondcrete, saltcrete, and spray irrigation.[2]

As to the spray irrigation claims, the district court found that Mr. Stone had not made disclosure or at least not sufficiently specific disclosure. Defendant avers that this point is moot because the verdict for the time frame including this claim was in its favor. We agree.[3] Thus, we need not concern ourselves with the district court's finding on this point.

Judge Matsch noted that Mr. Stone had conceded that he did not make pre-filing disclosure to the government of any knowledge he may have had underlying his claims with respect to "saltcrete." In its supplemental briefing submitted to this panel after the district court's completion of its task, defendant Rockwell does not suggest that this concession should have any effect on the judgment. In any event, from review of the record we have determined that the saltcrete and pondcrete allegations centered on the same time periods.[4] Consequently, if disclosure was made as to

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[2] These terms are explained in our published opinion.

[3] *See Pretrial Order*, IV App. 1063, 1095 at ¶ 14 (setting out the time frame for plaintiff's spray irrigation claim); *id.* at 1119 (jury verdict form finding for defendant on claim covering that time period).

[4] *See* Pretrial Order, IV App. Tabs C & D, 1063, 1097-99.

pondcrete, that would establish jurisdiction for the critical time period for which the jury awarded damages.

Thus, the real point of contention now is whether Stone disclosed the facts underlying his "pondcrete" claims to the government before commencing this suit.[5] On this issue, the district court made one especially significant finding–that a certain document had been produced to the government by Stone prior to suit having been filed. This document, an "Engineering Order" that Stone had attached as an exhibit to an affidavit filed in the district court, was noted in our previous opinion. The Engineering Order itself was an internal Rockwell document concerning pondcrete. On the Order, Stone had made these handwritten comments: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation...." 282 F.3d at 801.

Our view of this notation, as expressed in our opinion, is of critical importance in the present inquiry. We said, "This Engineering Order was explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed." *Id.*

The district court, however, took a different view of the document:

> His comment does not address whether the design to which he objects is for the method of pumping the ponds, the manufacture of pondcrete blocks or both. The document does not speak for itself and to find that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action requires the court to speculate about the content of conversations he had with the FBI and EPA agents and the Assistant United States Attorney.

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[5] It is worth noting that the United States did not contend in the district court that Mr. Stone had failed to make the necessary disclosures to the government.

Findings and Conclusions at 5. The judge then referred to the FBI agent's reports of interviews, known as 302 reports. The judge said that 302 reports

> are merely summaries of the agent's recollections of the conversation, but it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports.

*Id.* at 5-6.

We conclude that the district judge erred in holding that the production of the document was insufficient to support a finding that Mr. Stone had communicated his concerns about the manufacture of pondcrete to the government before filing his action. This holding violated the law of the case, *see, e.g., Huffman v. Saul Holdings Ltd.*, 262 F.3d 1128, 1132 (10th Cir. 2001), because it is fundamentally irreconcilable with our previous holding, quoted above, about the import of the document.[6] *Our previous holding about the import of the document, together with the district court's finding on remand that the document had been produced to the government before suit was filed, are sufficient to carry Stone's burden of persuasion on this point.*[7]

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[6] As appellant puts it:

> [T]he District Court expressly found that Mr. Stone had provided to the Government in March 1988–over a year *before* this action was filed–the very same documents on which this Court based its prior ruling that Mr. Stone satisfied the "direct and independent knowledge" prong of the original source test. This finding alone warrants denial of Rockwell's motion.

Plaintiff-Appellee/Cross-Appellant James S. Stone's Response at 1. *See also* Plaintiff-Appellee's March 7, 2003 Reply in Support of Cross-Motion For a Ruling Affirming the Judgment in its Entirety at 5.

[7] We find irrelevant the district court's inference that the document was not discussed with the FBI. As noted above, the court said that "if Mr. Stone attached such importance" to the subject, then it would be a fair inference that the 302 report would contain some reference to the

Therefore, we hold that the jurisdictional disclosure requirement was satisfied. In accordance with our previous opinion, the judgment of the district court is **AFFIRMED.** Mr. Stone's pending motion to supplement the record is **DENIED** as moot. Rockwell's motion for an order vacating the judgment of the district court is **DENIED.**

**IT IS SO ORDERED.**

BRISCOE, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court's factual findings on remand reinforce the unmistakable conclusion that Stone cannot establish that he qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B). I therefore again conclude that Stone's claims should be dismissed for lack of subject matter jurisdiction.

As "the party invoking federal jurisdiction," Stone bore "the burden of alleging facts essential to show jurisdiction under the False Claims Act [FCA]." *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1202 (10th Cir. 2003) (en banc) (internal quotations omitted). Because his claims under the FCA were based on publicly disclosed information, in order to establish subject matter jurisdiction, Stone was required to prove he was "an original source of th[at] information." 31 U.S.C. § 3730(e)(4)(A). To do so, Stone first had to prove he "ha[d] direct and independent knowledge of the information on which [his]

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subject. There is no statutory requirement that the relator have emphasized the specific facts on which a claim is later based, so long as the facts are disclosed.

Considering the volume of documents Stone produced to the government, and the number and scope of activities about which he was concerned, it would be unsound to draw the inferences made from an FBI agent's summarization of a meeting, as Judge Matsch himself had indicated on taking the case under advisement at the close of the hearing on remand. (It seems clear that Stone attached importance to all of the disclosures he made to the government concerning possible environmental consequences of mishandling of extremely hazardous materials, although the only relevant inquiry is whether he satisfied the disclosure requirements.)

allegations [we]re based." 31 U.S.C. § 3730(e)(4)(B). In other words, Stone had to prove he had direct and independent knowledge of "any essential element of the [underlying] fraud transaction." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (internal emphasis and quotation omitted). Stone also had to prove he "voluntarily provided the information to the Government" before filing his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).

Count One of the amended complaint, asserted jointly by the United States and Stone, alleged generally that Rockwell violated the FCA by "knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property." App. at 995. In particular, Count One alleged that, during the course of ten six-month contract award periods (running from October 1, 1986, through December 30, 1989), Rockwell concealed from the DOE environmental, safety, and health problems related to the processing and storage of pondcrete and saltcrete. At trial, the jury found Rockwell had violated the FCA during three of the contract award periods at issue and awarded $1,390,775.80 in damages (an amount equal to ten percent of the total fee award bonuses received by Rockwell during the three contract award periods).

In my dissent to the original panel opinion, I outlined why Stone had failed to establish he was an "original source" with respect to these prevailing FCA claims. In short, I concluded that although Stone had accurately predicted in a 1982 "Engineering Order" written during the course of his employment that Rockwell's proposed design for making pondcrete would not work, App. at 439, there was no evidence that he directly and independently knew that Rockwell actually experienced problems when it began producing pondcrete or that Rockwell concealed the resulting environmental problems from the DOE. Not only did Stone's employment with Rockwell end well before

either event occurred, his Engineering Order addressed neither the failure of pondcrete when it was later produced nor Rockwell's concealment of that failure from the DOE. The Engineering Order did not address these points for the simple reason it could not address events that had not yet occurred.

Although the district court's task on remand was focused solely on determining whether Stone had satisfied the "disclosure" component of the "original source" rule, its findings reinforce the conclusions I reached in my original dissent. Specifically, the district court found that, prior to filing suit, the only information possessed by Stone and provided to the government concerning pondcrete was the 1982 Engineering Order in which Stone opined that the company's proposed design for making pondcrete was flawed. The majority concludes disclosure of the Engineering Order to the government satisfies the "disclosure" component of the "original source" rule. I disagree. Because the Engineering Order only conveyed Stone's professional opinion that the proposed pondcrete design would not work, the fact that he provided a copy of the Engineering Order to the government in March 1988 did not satisfy the "disclosure" component of the § 3730(e)(4)(B) "original source" rule. Aside from providing the Engineering Order to the government, there is no evidence that, prior to suit, Stone informed the government, or was even aware, that Rockwell actually experienced problems with its pondcrete production and concealed such problems from the DOE. Thus, Stone cannot qualify as an "original source" and his FCA claims should be dismissed for lack of subject matter jurisdiction.

**[Here the Court reprints its Order on Rehearing, published at 282 F.3d 787, and reprinted herein at Pet. App. 1-48a.]**

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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Nos. 99-1351, 99-1352 & 99-1353

UNITED STATES OF AMERICA, *ex rel.* JAMES S. STONE, and UNITED STATES OF AMERICA,

Plaintiff-Appellees and Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants and Cross-Appellees,

and

AMERICAN HOSPITAL ASSOCIATION, NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, ELECTRONIC INDUSTRIES ALLIANCE,

Amici Curiae.

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**ORDER DENYING REHEARING AND REHEARING EN BANC**

Filed January 4, 2006

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Before **BRISCOE, HOLLOWAY** and **HARTZ,** Circuit Judges

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We have a petition for rehearing with a suggestion of rehearing en banc filed by Rockwell. The petition for panel rehearing is denied by Judges Holloway and Hartz, with Judge Briscoe voting to grant rehearing. A poll was requested on the suggestion of rehearing en banc, and that suggestion is now denied, a majority of the active circuit judges not having voted for rehearing en banc. Chief Judge Tacha, Judge Kelly, Judge Briscoe, Judge O'Brien and Judge McConnell voted to grant rehearing en banc. Judge Tymkovich recused.

Entered for the Court

by: /s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 89-C-1154

UNITED STATES OF AMERICA ex rel. JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

[ENTERED]
[February 2, 1994]
[JAMES R. MANSPEAKER, CLERK]
[US. DISTRICT COURT]

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ORDER

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CARRIGAN, J.

Qui tam plaintiff James S. Stone commenced this action on behalf of the United States pursuant to the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., naming Rockwell International Corporation as the defendant. Pursuant to Fed. R. Civ. P. 12(b)(1), Rockwell has moved to dismiss Mr. Stone's claim for lack of subject matter jurisdiction. Mr. Stone opposes that motion.

The issues have been fully briefed and oral argument was heard on January 5, 1994. Jurisdiction exists under 28 U.S.C. § 1331.

## I. FACTUAL BACKGROUND.

This case arises out of Rockwell's operation of the Department of Energy's (DOE) nuclear weapons production

facility at Rocky Flats, Colorado. Mr. Stone worked as an engineer at Rocky Flats from November 10, 1980 until March 1986. He asserts that following his discharge, he informed agents of the Federal Bureau of Investigation (FBI) of various environmental, health and safety improprieties at Rocky Flats.[1]

The gravamen of Mr. Stone's suit is his claim that Rockwell concealed from the DOE violations of environmental, health and safety laws, regulations and standards so that it could continue to receive payments and bonuses.

## II. ANALYSIS.

The FCA imposes civil liability on any person who, inter alia, knowingly presents a false claim for payment or makes a false record to get a false claim paid. 31 U.S.C. § 3129. It also authorizes private citizens to bring civil actions on behalf of the United States. 31 U.S.C. § 3730(b).

The Act, however, provides that:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing ... or from the news media, unless ... the person bringing the action is an original source of the information." § 3730(e)(4)(A).

An original source is:

> "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." § 3730(e)(4)(B).

This "original source" requirement applies even if a qui tam plaintiff's allegations are based only partly upon

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[1] Mr. Stone met with the FBI on at least three occasions and had numerous telephone calls with the Bureau. In March 1988 he turned over 2300 pages of documents to the FBI.

publicly disclosed allegations or transactions. United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 113 S. Ct. 1364 (1993). Mr. Stone's allegations involve incidents that were widely covered in the news media; therefore he must satisfy the "original source" requirement.[2]

Section 3730(e)(4)(B) imposes two plain and unambiguous jurisdictional requirements. Precision Co., 971 F.2d at 553. First, a qui tam plaintiff must show that he has direct and independent knowledge of the information on which his allegations are based. Id. Second, he must show that he provided that information to the government prior to filing suit.

Rockwell makes two arguments. First, it contends that Mr. Stone must show that he possessed direct and independent knowledge of Rockwell's alleged fraudulent statements or conduct, not merely violations of environmental, health and safety standards. Second, it argues that the FCA imposes a third jurisdictional requirement – that a qui tam plaintiff played a part in the original public disclosure of that information.

**A. Direct and Independent Knowledge of Actual Fraud.**

In response to interrogatories, Mr. Stone acknowledged that he did not know the specific persons who allegedly falsely told the government that Rockwell was in compliance with environmental, health and safety laws. He also acknowledged that he could not identify the specific documents containing such misrepresentations. Finally, Mr. Stone admitted in his deposition that he had no direct personal knowledge of Rockwell presenting false claims for payment.

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[2] Much of the media coverage came in June 1989, after the FBI executed a search warrant at Rocky Flats. The search warrant was supported by an affidavit signed by the agent with whom Mr. Stone had met.

Based on these admissions, Rockwell asserts that, at most, Mr. Stone had direct and independent knowledge of environmental, health and safety violations, not the acts that constituted the actual fraud – alleged misrepresentations and fraudulent demands for payment. Therefore, Rockwell contends, Mr. Stone is not an original source.

Mr. Stone's duties at Rocky Flats included plant-wide troubleshooting through which he gained knowledge of various environmental, health and safety problems. In addition, Mr. Stone was informed that Rockwell's compensation was based on compliance with applicable environmental, health and safety regulations. He was given a document stating that the "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs," including Nuclear Materials Management, Waste Management, Health Protection, Industrial Safety and Environmental Protection. Further, he was instructed not to divulge environmental, health and safety problems to the DOE.

Thus there is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. The fact that Mr. Stone was not aware of the specific persons or documents involved does not erase this knowledge.

As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the informat on on which the allegations are based.

B. Source of Original Public Disclosure.

Rockwell argues that Mr. Stone also must demonstrate that he played a part in the original public disclosures of the information on which his allegations are based. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992) ("To bring a

qui tam suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit."); United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) ("(A) plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.").

Dick purported to find this third requirement, not in the definition of original source, § 3730(e)(4)(B), but in the legislative history of the 1986 amendments. 912 F.2d at 17-18. To gain entrance to that history it first had to conclude that the word "information" does not mean in § 3730(e)(4)(A) what it means in S 3730(e)(4)(B). Id. at 16-17. Reaching this conclusion required the court to disregard the rule that identical words used in the same section are presumed to mean the same thing. Id. at 16. Only after doing so could the court give effect to its interpretation of congressional intent by adding a third requirement to the definition of original source that was not included in the statute's text.[3]

The Tenth Circuit has not addressed the merits of this third requirement. Precision Co., 971 F.2d at 553 n.4. It has noted, however, that:

> "Two jurisdictional requirements are evident from the plain language of [§ 3730(e)(4)(B)]: 1) a qui tam plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a qui tam plaintiff must have voluntarily provided such information to the government prior to filing suit. These requirements are plain, unambiguous and require no further scrutiny. Id. at 553 (emphasis added).

This passage does not address directly the question presented here. It does, however, indicate that courts

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[3] Section 3730(e)(4)(A) provides that suits based on public information are barred unless the plaintiff "is an original source of the information." Dick and Wang append the words "that was publicly disclosed" to the end of this sentence.

should confine their interpretations of the original source rule to the plain meaning of the text. While legislative history might be useful in interpreting the explicit requirements, it reaches too far to use that history to add a requirement that is not in the text.

As a result this court is left with no alternative but to conclude that § 3730(e)(4)(B) contains the universe of requirements for original source status and that Mr. Stone satisfies those requirements.[4]

Accordingly IT IS ORDERED that:

(1) Defendant's motion to dismiss for lack of subject matter jurisdiction is denied; and

(2) The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order, stating the results of their settlement negotiations and whether a conference before a Magistrate Judge or some other alternative dispute resolution proceeding would facilitate settlement.

Dated at Denver, Colorado February 2, 1994

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

[4] In light of this holding the court need not address whether Mr. Stone would be an original source under the Wang/Dick standard.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA and
UNITED STATES OF AMERICA,
ex rel. JAMES STONE,

Plaintiffs,

vs. 89 M 1154

ROCKWELL INTERNATIONAL
CORPORATION, et al.,

Defendant.

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ORAL ARGUMENT ON JUDGMENT ISSUES
TRANSCRIPT OF PROCEEDINGS

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Proceedings held before the HONORABLE RICHARI P. MATSCH, U. S. District Judge for the District o Colorado, beginning at 10:56 a.m. on the 7th day of May 1999, in Courtroom C-204, United States Courthouse Denver, Colorado.

* * *

THE COURT:

* * *

And we have yet left this matter of whether James Stone, and on the present state of the record, i properly a relator. The ruling that was made by Judge Carriga early on in this case, I am going to adhere to. And thes arguments about whether that ruling is somehow affected by th

evidence
that was heard at the trial and by the subsequent developments in the case, I understand the defendant's argument that the claims that actually went to trial were not the claims that he was making at the time of Judge Carrigan's ruling, but I'm not going to revisit all that. I'm going to adhere to the ruling previously made in the case, and say that James Stone is properly a relator under the False Claims Act, and that can be reviewed on appeal.

* * *

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Chief Judge Richard P. Matsch**

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE, AND UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION and BOEING NORTH AMERICAN, INC.,

Defendants.

[FILED]
[MAY 13, 1999]
[JAMES R. MANSPEAKER, CLERK]
[U.S. DISTRICT COURT]

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**ORDER FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)**

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On April 1, 1999, a duly empaneled jury of twelve members returned a verdict for the plaintiffs on three claims of violation of the False Claims Act and awarded compensatory damages of $1,390,775.00 on those claims. The jury found for the defendants on the other seven False Claims Act claims and the claim of the United States for breach of contract. At a hearing held on May 7, 1999, based on all of the evidence received at trial, the court ruled that, as a matter of law, judgment should enter for the defendants

on the equitable claims of the United States for unjust enrichment and recovery of payments made by mistake because the remedy at law is adequate, the evidence fails to support those claims and such remedies would be inconsistent with the jury verdict for the defendants on the claim for breach of contract. The court also ruled that judgment should enter for the defendants, as a matter of law, under Fed. R. Civ. P. 50(a) on the claim of the United States for damages for common law fraud, a claim that was not submitted to the jury because the government withdrew it. In the alternative, considering the oral motion to withdraw as a motion under Fed. R. Civ. P. 41(a)(2), the court orders that dismissal of the claim must be with prejudice.

The separate claims for violations of the False Claims Act by the relator, James S. Stone, in Count Six of the Amended Complaint, filed December 20, 1996, are determined to be separate and independent claims within the meaning of Fed. R. Civ. P. 54(b), which should be stayed until after final disposition of any appeals from the judgment to be entered pursuant to this order. The court expressly determines that there is no just reason for delay in the entry of judgment on the other claims. The court expressly adheres to the February 2, 1994 ruling of Judge Jim R. Carrigan that James S. Stone is properly a *qui tam* relator in this civil action and denies the challenge to the constitutionality of that statute in the defendants motion to dismiss filed on May 5, 1999.

The court now finds and concludes that a civil penalty of $5,000.00 for each of the False Claims Act violations found by the jury, for a total penalty of $15,000.00 is appropriate under 31 U.S.C. § 3729(a) and that the jury's award of compensatory damages must be trebled under that statute.

Upon the foregoing, it is now

ORDERED that the Clerk of this Court shall enter a final judgment under Fed. R. Civ. P. 54(b) awarding the plaintiffs compensatory damages of $4,172,325.00; and for the payment to the United States of a civil penalty of $15,000.00 on Count One of the Amended Complaint, and the judgment shall enter for the defendants dismissing, with prejudice, Counts Two through Five of the Amended Complaint. The judgment shall direct that any party seeking costs must file a bill of costs within 10 days from entry of judgment.

DATED: May 13th, 2006

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE RICHARD P. MATSCH

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA and
UNITED STATES OF AMERICA *ex rel.* James S. Stone,

Plaintiffs,

v.

ROCKWELL AUTOMATION, INC. and
BOEING NORTH AMERICAN, INC.,

Defendants.

[FILED]
[DEC. 17, 2002]
[JAMES R. MANSPEAKER, CLERK]
[U.S. DISTRICT COURT]

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FINDINGS AND CONCLUSIONS ON LIMITED REMAND

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After holding that James S. Stone ("Mr. Stone" or "Relator") adequately proved that he had direct and independent knowledge of his allegation that Rockwell International Corp. ("Rockwell"), manufactured insolid pondcrete and concealed it from the govei nment in satisfaction of that requirement as an original source under the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), the Tenth Circuit Court of Appeals ordered this court to make findings and conclusions to determine whether Mr. Stone satisfied the pre-filing disclosure prong of the "original source" test,

31 U.S.C. § 3730(e)(4)(B) and ordered a limited remand to conduct such further proceedings as may be necessary and then supplement the record on appeal. More specifically, the court identified the purpose of the limited remand as follows:

> The limited remand to the district court is for the purpose of that court making findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith.

*United States, ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 792 (10th Cir. 2002).

Mr. Stone then filed in this court a motion for a finding that he had made the requisite disclosures to the government before filing this action. The defendants filed their response and the Relator filed a reply. The parties submitted three volumes of excerpts from the appellate record and the defendants filed an additional record on remand including an affidavit of Kenneth A. Thompson, with attachments, which the court rejected by sustaining the Relator's objection to it. The additional record also included an affidavit of Richard J. Ney, attesting to a copy of an opinion of the Board of Contract Appeals of the Department of Energy which this court holds is irrelevant. The other portions of the additional record are copies of pleadings and other materials to which there has been no objection.

At oral argument held on November 25, 2002, all counsel agreed that this court's findings and conclusions should be made based on the record contained in these submissions without the need for any additional evidentiary hearing.

The Relator concedes that he did not provide any information to any government representatives concerning claims relating to saltcrete.

The Relator's position as to pondcrete is that what he provided to government representatives before filing his complaint on July 5, 1989, is the same information cited by the Court of Appeals in holding that Mr. Stone had direct and independent knowledge on that subject. The defendant disputes that contention and asserts that while Mr. Stone knew that the design for the removal of sludge from holding ponds and mixing it with cement to form blocks was defective and would result in deterioration and leakage of toxic material, he did not communicate his knowledge to any government representative. To resolve that dispute, this court has carefully considered the record excerpts provided and makes the following findings of fact using the standard of a preponderance of evidence with the burden of persuasion being on Mr. Stone.

In response to the Rockwell motion to dismiss under Fed.R.Civ.P. 12(b)(1), Mr. Stone filed his affidavit addressing the issue of his direct and independent knowledge of the allegations set forth in his original complaint. The Court of Appeals specifically relied on that affidavit in its *de novo* review of Judge Carrigan's ruling as to the first prong of the original source test. The affidavit appears beginning at Page 290 in Volume I of the excerpts from the record. The paragraphs pertinent to pondrete are paragraphs 14 and 15 describing what Mr. Stone learned about plans for manufacturing pondcrete and his communications to Rockwell management.

> 14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper manufacturing process for "pondcrete." Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture

be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (See, Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks. Vol. 1, pp. 298-299.

Exhibit B, Attachment 1, items 2 and 3 is a copy of the plaintiffs} conso idated answers and responses to discovery in 1992 providing factual bases for claims of contract violations and criminal charges as directed by a magistrate judge in the course of discovery in this litigation.

A key document relied on by Mr. Stone is his notation oi the engineering order which appears as Exhibit E to th affidavit and is at Page 439 of Volume I of the record.

> This design will not work, in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of my objections & potential alternatives. Jim Stone 10-13-82

In his affidavit, Mr. Stone described his meetings with FBI Agent Lipsky and representatives of the Environmental Protection Agency and on one occasion with an Assistant United States Attorney. Mr. Stone also wrote that he provided the FBI with over 2,300 pages of documents. Mr. Stone called particular attention to an FBI report by Agent Lipsky summarizing a June 25, 1987, meeting with him and EPA Agent William F. Smith. A copy is Exhibit M to the Stone affidavit. Nothing in that document refers to pondcrete. Exhibit N is Agent Lipsky's report of a meeting with Mr. Stone, his attorney, an EPA agent and an Assistant U. S. Attorney on February 17, 1988. The discussion concerned Berylium dust exposure and incinerators. There is no mention of pondcrete.

In his affidavit, Mr. Stone refers to providing the FBI with copies of pleadings filed by him in his state court lawsuit against Rockwell in the District Court of Jefferson County, Colorado. That complaint does not include allegations regarding pondcrete.

While there is no specific identification of all of the documents provided to the FBI by Mr. Stone, it is fair to infer that they included the engineering order at Page 439 of the record. His comment on that document does not address specifically the plans for mixing the sludge and cement to form the pondcrete blocks. His comment does not address whether the design to which he objects is for the method of pumping the ponds, the manufacture of pondcrete blocks or both. The document does not speak for itself and to find that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action requires the court to speculate

about the content of conversations he had with the FBI and EPA agents and the Assistant United States Attorney.

It is recognized that the FBI agent's 302 reports are merely summaries of the agent's recollections of the conversation, but it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports.

At the time of filing of his complaint, Mr. Stone's counsel submitted a disclosure statement of material evidence and information, referred to in the Tenth Circuit's opinion. As the court noted, paragraph 14 of that statement described Mr. Stone's knowledge and information regarding the design for the system for removing sludge from solar evaporation ponds and the preparation of the pondcrete blocks. The court quoted the language from the disclosure statement at page 509 of the appendix: "Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge-waste and cement such that the 'pondcrete' blocks would rapidly disintegrate thus creating additional contamination problems" *Stone v. Rockwell International Corp.* at p. 801.

That is the most explicit statement in the record and while it is evidence of what Mr. Stone then knew, it is not evidence of what information Mr. Stone submitted to the government before the filing of the original complaint. The disclosure must be made prior to filing the complaint according to the express language of § 3730(e)(4) and as made clear in *King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), cert. denied, 122 S.Ct. 1205 (2002). Accordingly, the disclosure statement has been disregarded in these findings.

With respect to the spray irrigation claims, Mr. Stone's affidavit refers to the complaint he filed in the Jefferson

County District Court, attached as Exhibit P which included the following paragraph:

> (b) On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiffs concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiffs engineering report. (Paragraph 5b) Vol. I, p. 477.

The claim submitted to the jury at trial was surface runoff of spray irrigated effluent into Woman Creek from the east spray fields. No information specific to that matter was disclosed.

The foregoing findings are submitted without expressing any legal conclusions as to their significance under the controlling law because such legal conclusions are not considered to be within the scope of the limited remand. Although the appellate court's order directed this court to make findings and conclusions with respect to the claims that ultimately went to trial it is not the prerogative of this court to determine whether the information required to be disclosed before trial is to be considered as that which supports the allegations of the original complaint as contrasted with the amended pleadings and the claims submitted to the jury.

It is now

ORDERED that these findings and conclusions be forwarded to the Clerk of the Tenth Circuit Court of Appeals together with the papers filed in this court subsequent to the order of limited remand as a supplemental record on the pending appeal.

Dated: December 17th, 2002

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

## 31 U.S.C. § 3730

### § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

* * *

(e) Certain actions barred.

* * *

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government [General] Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

* * *

## UNITED STATES CONSTITUTION
## ARTICLE II

**Section 1.**
The executive Power shall be vested in a President of the United States of America.

* * *

**Section 2.**

* * *

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**Section 3.**

He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene

both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * *

(4)

No. 05-1272

FILED
JUL 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the *qui tam* relator in this False Claims Act case was "an original source," within the meaning of 31 U.S.C. 3730(e)(4), of the information on which the suit was based.

2. Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3729 *et seq.*, are consistent with the Appointments Clause and the Take Care Clause of Article II of the United States Constitution.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 10
Conclusion ..... 24

## TABLE OF AUTHORITIES

Cases:

*Auffmordt* v. *Hedden*, 137 U.S. 310 (1890) ..... 19
*Bowsher* v. *Synar*, 478 U.S. 714 (1986) ..... 17
*Buckley* v. *Valeo*, 424 U.S. 1 (1976) ..... 20
*Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562 (11th Cir. 1994) ..... 13, 14
*Comstock Resources, Inc.* v. *Kennard*, cert. denied, 125 S. Ct. 2957 (2005) ..... 15, 16
*Edmond* v. *United States*, 520 U.S. 651 (1997) ..... 20
*Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 3
*INS* v. *Chadha*, 462 U.S. 919 (1983) ..... 17
*Juliano* v. *Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), aff'd, 959 F.2d 1101 (D.C. Cir. 1992) ..... 22
*Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) ..... 19
*Marsh* v. *Chambers*, 463 U.S. 783 (1983) ..... 17
*Marvin* v. *Trout*, 199 U.S. 212 (1905) ..... 17, 18

Cases—Continued: Page

*Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir.), cert. denied, 537 U.S. 944 (2002) ..... 14, 15

*Mistretta* v. *United States*, 488 U.S. 361 (1989) ..... 19

*Morrison* v. *Olson*, 487 U.S. 654 (1988) ..... 23

*Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) ..... 21

*Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir.), cert. denied, 126 S. Ct. 341 (2005) ..... 22

*Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) ..... 16, 17

*Swift* v. *United States*, 318 F.3d 250 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003) ..... 22

*United States* v. *Germaine*, 99 U.S. 508 (1879) ..... 8, 19

*United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868) ..... 19

*United States ex rel. Aflatooni* v. *Kitsap Physicians Servs.*, 163 F.3d 516 (9th Cir. 1999) ..... 14

*United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994) .... 16

*United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) ..... 17, 18

*United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000) ..... 12, 13

*United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 11, 14, 15

*United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) ..... 16

Cases—Continued: Page

*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 7, 16, 17, 18
*Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265 (1888) ..... 17

Constitution and statutes:

U.S. Const.:
Art. II ..... 16, 17, 18
§ 2 (Appointments Clause) ..... 8, 16, 19, 20
§ 3 (Take Care Clause) ..... *passim*
Art. III ..... 16, 17, 18
False Claims Act, 31 U.S.C. 3729 *et seq.* ..... *passim*
31 U.S.C. 3729(a) ..... 2
31 U.S.C. 3729(a)(1) ..... 2
31 U.S.C. 3729(a)(2)-(7) ..... 2
31 U.S.C. 3730(a) ..... 2
31 U.S.C. 3730(b) ..... 19
31 U.S.C. 3730(b)(1) ..... 2
31 U.S.C. 3730(b)(2) ..... 2
31 U.S.C. 3730(c)(2)(A)-(C) ..... 22
31 U.S.C. 3730(c)(2)(C) ..... 22
31 U.S.C. 3730(c)(3) ..... 2, 22
31 U.S.C. 3730(c)(4) ..... 23
31 U.S.C. 3730(d) ..... 2
31 U.S.C. 3730(e)(4) ..... 3, 10, 11
31 U.S.C. 3730(e)(4)(A) ..... 4
31 U.S.C. 3730(e)(4)(B) ..... *passim*

Statutes—Continued: Page

Freedom of Information Act, 5 U.S.C. 552 ..... 13
42 U.S.C. 2000e-5(f)(1) ..... 2, 14, 15

# In the Supreme Court of the United States

No. 05-1272

ROCKWELL INTERNATIONAL CORP., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-55a) is not published in the *Federal Reporter*, but is reprinted in 92 Fed. Appx. 708. An earlier opinion of the court of appeals (Pet. App. 1a-48a) is reported at 282 F.3d 787. The opinions of the district court (Pet. App. 58a-63a, 66a-68a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 5, 2004. A petition for rehearing was denied on January 4, 2006 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits an array of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A person who violates the FCA "is liable to the United States Government for a civil penalty * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and penalties may be brought either by the Attorney General or by a private person (known as a relator) in the name of the United States in an action commonly known as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General

or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

2. From 1975 through 1989, petitioner Rockwell International Corporation operated the Rocky Flats nuclear-weapons facility pursuant to a contract with the Department of En rgy (DOE). Under the contract, DOE paid petitioner on a cost-plus fee basis. DOE reimbursed petitioner for allowable costs that petitioner incurred in operating the plant, and petitioner received an annual base fee derived using a predetermined percentage of the contract's overall value. In addition, petitioner received a semiannual bonus based on DOE's evaluation of petitioner's performance in areas that included environmental, safety, and health operations. Pet. App. 3a.

From November 1980 until March 1986, respondent James B. Stone worked as a Principal Engineer in the Facilities, Engineering, and Construction Division at Rocky Flats. After Stone's employment with the company terminated, he informed a special agent of the Federal Bureau of Investigation (FBI) that environmental crimes had allegedly been committed at Rocky Flats during the period of Stone's employment. Based upon the information that Stone had provided, the special

agent prepared an affidavit and obtained a warrant to search the Rocky Flats facility. The search was conducted on June 6, 1989. The special agent's affidavit was unsealed three days later, and the allegations of environmental violations at Rocky Flats received substantial media coverage. Pet. App. 3a-4a.

3. Approximately one month after the search of the Rocky Flats facility, Stone filed this *qui tam* action against petitioner. Stone's complaint alleged that, in an effort to maximize its receipt of award fees and other payments under its government contract, petitioner had violated the FCA by falsely representing to DOE that petitioner had complied with applicable environmental, safety, and health requirements in its operation of the Rocky Flats facility. While Stone's FCA action was proceeding, the government conducted a criminal investigation into petitioner's management of Rocky Flats, which culminated in March 1992 in a plea agreement in which petitioner pleaded guilty to ten environmental violations. Pet. App. 4a-7a.

Petitioner moved to dismiss Stone's complaint for want of jurisdiction. Under the FCA, a court lacks jurisdiction over a *qui tam* suit that is "based upon the public disclosure of allegations or transactions" unless the relator is an "original source of the information." 31 U.S.C. 3730(e)(4)(A); see pp. 2-3, *supra*. Petitioner contended (see Pet. App. 7a-8a, 60a) that Stone's complaint was based upon publicly-disclosed information and that Stone could not qualify as an "original source" because he lacked the requisite "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B); see p. 3, *supra*.

After Stone filed an opposition supported by an additional affidavit, the district court denied petitioner's

motion to dismiss. Pet. App. 58a-63a. The court found that Stone qualified as an "original source" even though he could not identify the specific individuals who had made misrepresentations to the government on petitioner's behalf or the specific documents in which those misrepresentations had been made. See *id.* at 60a-61a. The court explained that, in the course of his employment at Rocky Flats, Stone had "gained knowledge of various environmental, health and safety problems"; had been "informed that [petitioner's] compensation was based on compliance with applicable environmental, health and safety regulations"; and had been "instructed not to divulge environmental, health and safety problems to the DOE." *Id.* at 61a. The court concluded that Stone "had direct and independent knowledge that [petitioner's] compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Ibid.* The court held on that basis that Stone had the requisite "direct and independent knowledge of the information on which the allegations are based" and therefore qualified as an "original source." *Ibid.*

In November 1995, the United States moved to intervene in the action, and the district court granted that motion. In an amended complaint filed the following month, Stone and the United States restated Stone's initial allegations concerning petitioner's misrepresentations about the operation of the Rocky Flats facility. The government also asserted several common-law claims, including claims for fraud and breach of contract. Pet. App. 8a-9a.

At the ensuing jury trial, "[t]he main issue * * * was whether [petitioner] concealed from DOE environ-

mental, safety, and health problems related to the processing and storage of saltcrete and pondcrete, two forms of processed toxic waste." Pet. App. 9a. The jury found that petitioner had violated the FCA over an 18-month period beginning April 1, 1987. *Ibid.*; Pet. 4. The district court subsequently entered judgment in favor of the United States and Stone in the amount of $4,172,327. Pet. App. 10a.

4. The court of appeals affirmed in part and remanded the case to the district court for additional findings on one aspect of the "original source" question. Pet. App. 1a-48a.

a. The court of appeals held that Stone had established "direct and independent knowledge of the information on which the allegations are based" (31 U.S.C. 3730(e)(4)(B)), which a relator is required to possess when a *qui tam* suit is based upon publicly-disclosed information. Pet. App. 11a-22a. The court stated that, to satisfy the FCA's "direct and independent knowledge" requirement, "the knowledge possessed by the relator must be marked by the absence of any intervening agency and unmediated by anything but the relator's own labor." *Id.* at 15a (ellipses, brackets, internal quotation marks, and citation omitted). The court rejected petitioner's contention that an "original source" must have "direct and independent knowledge of the actual fraudulent submission to the government." *Id.* at 20a. Rather, the court explained, a relator "need only possess 'direct and independent knowledge of the information on which the allegations are based.'" *Ibid.* (quoting 31 U.S.C. 3730(e)(4)(B)).

The court of appeals also rejected petitioner's contention that "Stone could not be an original source for the pondcrete claim because he no longer worked at

Rocky Flats when the manufacture of pondcrete blocks commenced." Pet. App. 21a. The court explained:

> The gravamen of Stone's claim is that he learned from studying [petitioner's] plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case [petitioner's] awareness that it would be using a defective process for manufacturing pondcrete.

*Ibid.*

b. In addition to possessing "direct and independent knowledge of the information on which the allegations are based," an "original source" must "voluntarily provide[] the information to the Government before filing" an action under the FCA. 31 U.S.C. 3730(e)(4)(B). The court of appeals concluded that the record was insufficient to enable it to determine whether Stone had satisfied that requirement. Pet. App. 22a. The court therefore remanded the case to the district court for additional proceedings to resolve that question. *Id.* at 22a-23a.

c. Petitioner raised various constitutional challenges to the *qui tam* provisions of the FCA. The court of appeals rejected those claims. Pet. App. 23a-29a.

i. Based on this Court's intervening decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the court of appeals held that Stone had Article III standing to pursue his *qui tam* suit. Pet. App. 23a-24a.

ii. The court of appeals rejected petitioner's contention that the FCA's *qui tam* provisions violate the Appointments Clause of Article II, Section 2, of the Constitution. Pet. App. 24a-26a. The Court observed that "[t]he procedural requirements of the Appointments Clause only apply to the appointment of officers," and it concluded that "*qui tam* relators do not serve in any office of the United States." *Id.* at 25a. The court explained:

> There is no legislatively created office of informer or relator under the FCA. Relators are not entitled to the benefits of officeholders, such as drawing a government salary. And they are not subject to the requirement, noted long ago by [this] Court, that the definition of an officer "embraces the ideas of tenure, duration, emolument, and duties, and the latter were continuing and permanent, not occasional or temporary."

*Ibid.* (quoting *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879)).

iii. The court of appeals held that the application of the FCA's *qui tam* provisions in this case did not unconstitutionally interfere with the President's ability, pursuant to Article II, Section 3, to take care that the laws be faithfully executed. Pet. App. 26a-29a. The court limited its holding to cases, like this one, in which the government exercises its statutory right to intervene in ongoing *qui tam* litigation. The court explained:

> The Government sought, and was granted permission, to intervene. Consequently, the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. Given that the Government was permitted to intervene, we re-

> main unconvinced by [petitioner's] contention that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities.

*Id.* at 27a; see *id.* at 28a ("[A]t least where the Government is permitted to intervene and does so, the *qui tam* provisions of the FCA do not violate the Take Care Clause provisions of Article II and their separation of powers principles.").

d. Judge Briscoe concurred in part and dissented in part. Pet. App. 44a-48a. She would have held that Stone failed to qualify as an "original source" because the record contained "no evidence that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or [petitioner's] efforts to conceal those problems from the DOE." *Id.* at 46a.

5. On remand, the district court issued additional findings and conclusions pursuant to the court of appeals' order. Pet. App. 69a-76a. The court noted that Stone had "concede[d] that he did not provide any information to any government representatives concerning claims relating to saltcrete." *Id.* at 70a. With respect to pondcrete, the district court found, inter alia, that Stone had submitted to the government an engineering order with Stone's handwritten notation commenting on the design of one particular aspect of Rockwell's proposed toxic waste removal system. *Id.* at 72a-73a. The handwritten notation stated: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." *Id.* at 73a. In accordance with its understanding of the limited scope of the remand order, the district court de-

clined to determine the legal significance of its findings. *Id.* at 75a.

6. The court of appeals affirmed the judgment in favor of the United States and Stone. Pet. App. 49a-55a. In concluding that Stone had adequately apprised the government of the allegations on which his *qui tam* suit was based, the court attached "critical importance" to the engineering order with Stone's handwritten notation. *Id.* at 51a.

Judge Briscoe dissented, again expressing the view that Stone did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B). Pet. App. 53a-55a.

## ARGUMENT

1. Petitioners contend (Pet. 14-24) that Stone does not qualify as an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B), principally because (in petitioners' view) Stone did not possess the "direct and independent knowledge of the information on which the allegations are based" that Section 3730(e)(4)(B) requires. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

a. Petitioners contend that Stone's direct knowledge of the relevant facts was limited to "background information" (Pet. 15), and that the Tenth Circuit's treatment of Stone as an "original source" "effectively eviscerates the jurisdictional bar of [31 U.S.C.] 3730(e)(4)" (Pet. 13). Those characterizations substantially understate the significance of Stone's knowledge. In the course of his employment with petitioner Rockwell, Stone learned that petitioner's compensation under its government contract "was based on compliance with applicable envi-

ronmental, health and safety regulations." Pet. App. 61a. And because Stone "was instructed not to divulge environmental, health and safety problems to the DOE," Stone could reasonably infer, again based on knowledge that he acquired as a company insider, that petitioner was engaged in an ongoing practice of "conceal[ing] its deficient performance so that it would continue to receive payments." *Ibid.* In addition, Stone "obtained, through his own efforts and not through the labors of others, direct and independent knowledge that [petitioner's] designs for manufacturing pondcrete blocks would result in the release of toxic waste." *Id.* at 17a.

Thus, in his capacity as a Rockwell employee, Stone acquired substantial information concerning both the company's representations to the government and its actual practices at the Rocky Flats facility. Stone's role in this case was therefore very different from that of the "parasitic" relators at whom the "public disclosure" bar is directed. See *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649-651 (D.C. Cir. 1994) (*Springfield*) (describing historical development of the "public disclosure" bar and its role in curbing "parasitic" *qui tam* suits). The Tenth Circuit's analysis reflects a pragmatic effort to distinguish between those relators who provide meaningful assistance in putting the government on the trail of fraud, and those who simply exploit pre-existing knowledge of possible wrongdoing. That approach is consistent with both the text and purposes of 31 U.S.C. 3730(e)(4).

In the court of appeals, petitioners' principal argument with respect to Section 3730(e)(4)(B) was that, in order "to establish himself as an original source, Stone needed to have had direct and independent knowledge of the specific documents that informed DOE that Rocky

Flats was in compliance with environmental, health and safety laws, as well as the specific individuals who submitted those inaccurate claims." Pet. App. 20a. The Tenth Circuit correctly rejected that contention. See *id.* at 20a-21a. Section 3730(e)(4)(B) requires that an "original source" must have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It does not require that the relator have direct and independent knowledge of particular fraudulent documents or other details of the fraud. The text of Section 3730(e)(4)(B) therefore does not require that an "original source" must personally observe the fraud, in whole or in part, as it is occurring.

b. Petitioners' claim of a circuit conflict (Pet. 14-22) is unfounded.

In *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000), the court of appeals held that the relator could not qualify as an "original source" because it learned of the defendant's alleged misrepresentations to

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[1] In order to qualify as an "original source," an individual must both "ha[ve] direct and independent knowledge of the information on which the allegations are based" and "ha[ve] voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B). In requiring that the relevant "information" be "voluntarily provided * * * to the Government," Congress was presumably concerned not with the details of the pertinent requests for payment (which would already be in the government's possession), but with extrinsic evidence showing those requests to be fraudulent. Because the text of Section 3730(e)(4)(B) indicates that an "original source" must have "direct and independent knowledge" of the *same* information that must be "voluntarily provided * * * to the Government," a similar focus is appropriate here.

the federal government through a public release under the Freedom of Information Act and therefore lacked "direct and independent" knowledge of those misrepresentations. See *id.* at 388-389. That conclusion is consistent with the Tenth Circuit's decision in this case. In *Mistick*, the relator apparently learned of the allegedly fraudulent requests for additional funding submitted to the government only through the FOIA release from the government, see *id.* at 380-381, while in this case Stone gained knowledge as an insider with Rockwell. Stone learned during the course of his employment that payments under Rockwell's government contract were "based on compliance with applicable environmental, health and safety regulations" and that Rockwell had not complied with those laws, and he "was instructed not to divulge environmental, health and safety problems to the DOE." Pet. App. 61a. Thus, while Stone did not have access to particular requests for payment submitted by petitioner, his status as a company insider apprised him of petitioner's willingness to misrepresent relevant facts in order to increase its compensation under the federal contract. The court in *Mistick* had no occasion to address the question whether knowledge of that character is sufficient to satisfy the statute.

There is also no basis for petitioners' contention (Pet. 16-17) that the Tenth Circuit's decision in this case conflicts with the ruling in *Cooper* v. *Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), in which the court of appeals, like the Tenth Circuit in this case, held that the relator *did* qualify as an "original source." The court in *Cooper* pointed out that the particular information that the relator obtained through his own efforts was "potentially specific, direct evidence of fraudulent activity" and was "more than background

information." *Id.* at 568 n.12; see *id.* at 568. The court in *Cooper* made no effort to describe the categories of information that a relator must acquire directly and independently in order to satisfy the requirements of 31 U.S.C. 3730(e)(4)(B), and it therefore did not exclude information such as that acquired by Stone. And the knowledge that Stone acquired in this case, like that in *Cooper*, was more than mere "background information."

Petitioners' reliance (Pet. 18) on *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999), is also misplaced. In *Aflatooni*, the relator claimed to have "learned of [the defendant's] alleged fraudulent activities by speaking with patients who had previously received medical services from [the defendant], and by reviewing their medical records," *id.* at 525, and yet even then could not recall the name of a single Medicare patient who had allegedly been charged for unnecessary procedures, see *id.* at 526. Stone, by contrast, was a company insider who acquired substantial knowledge of petitioner Rockwell's practices while acting in that capacity. And while the court in *Aflatooni* stated that an "original source" must have "'information,' as opposed to speculation," that the defendant has submitted false claims, *ibid.*, it did not announce any test for distinguishing between the two. There is consequently no basis for concluding that the Ninth Circuit would have reached a different outcome in this case.

Finally, the Tenth Circuit's decision in this case does not conflict with the District of Columbia Circuit's ruling in *Springfield* or that of the Eighth Circuit in *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032 (*Minnesota Ass'n*), cert. denied, 537 U.S. 944 (2002). As petitioners acknowledge (Pet. 19), the District of Columbia and Eighth Circuits

have squarely *rejected* the contention that an "original source" must have "direct and independent" knowledge of the specific content of the defendant's misrepresentations. See *Springfield*, 14 F.3d at 656-657; *Minnesota Ass'n*, 276 F.3d at 1050. Rather, it is sufficient in both courts' view if the relator has "direct and independent" knowledge of the true state of affairs that the defendant has falsely represented. See *Springfield*, 14 F.3d at 657 (relator qualified as "original source" because it "had direct and independent knowledge of essential information underlying the conclusion that fraud had been committed"); *Minnesota Ass'n*, 276 F.3d at 1050 ("If the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand."). Those holdings are fully consistent with the Tenth Circuit's determination that Stone satisfied the requirements of 31 U.S.C. 3730(e)(4)(B) because "he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that [petitioner's] designs for manufacturing pondcrete blocks would result in the release of toxic waste." Pet. App. 17a.

c. The petition for a writ of certiorari in *Comstock Resources, Inc.* v. *Kennard*, cert. denied, 125 S. Ct. 2957 (2005) (*Comstock*) (No. 04-165), also asserted a circuit conflict regarding the proper interpretation of 31 U.S.C. 3730(e)(4)(B). The government's amicus brief in *Comstock* explained (at 12-13) that Section 3730(e)(4)(B) does not lend itself to bright-line rules because a relator's knowledge of different categories of relevant information will often be acquired through different means, and the text of Section 3730(e)(4)(B) provides no set formula for determining what portion of that information the relator must perceive "directly" in order to qualify as an

"original source." That amicus brief further explained (at 18) that the existence of some imprecision in the statutory language has not created significant practical difficulties in the government's enforcement of the FCA. This Court denied the petition for a writ of certiorari in *Comstock*, and there is no reason for a different result here.

2. Petitioners contend (Pet. 24-30) that the FCA's *qui tam* provisions violate the Appointments Clause and the Take Care Clause of Article II. As petitioners acknowledge (Pet. 26-27 & nn.23-24), the courts of appeals have uniformly rejected similar constitutional challenges. See *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752-758 (5th Cir. 2001) (en banc); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 757-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994). Petitioners' claims lack merit and do not warrant this Court's review.

a. In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-778 (2000) (*Stevens*), this Court held that *qui tam* relators have Article III standing to pursue actions under the FCA. The Court did not decide whether the Act's *qui tam* provisions comport with the Appointments Clause and the Take Care Clause. See *id.* at 778 n.8. In two respects, however, the Court's analysis in *Stevens* supports the conclusion that the *qui tam* provisions are consistent with Article II.

First, the Court in *Stevens* observed that, "immediately after the framing, the First Congress enacted a considerable number of informer statutes," some of which (like the FCA in its current form) "provided both

a bounty and an express cause of action." 529 U.S. at 776-777; see *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n. 4 (1943) ("Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.") (quoting *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905)). Legislation "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)). Contrary to petitioner's contention (Pet. 30 n.25), that historical evidence bears directly on the Article II questions presented here. See *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986) (giving weight to the conclusion of the First Congress that the Legislative Branch should have no role in the removal of Executive officers); *Riley*, 252 F.3d at 752 (finding it "logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute"); cf. *INS* v. *Chadha*, 462 U.S. 919, 946-951 (1983) (attaching significance to the Framers' conception of the manner in which the legislative process would operate).[2]

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[2] Petitioners contend that the "early *qui tam* statutes required a citizen to have suffered some private injury before he could sue on behalf of the government." Pet. 30 n.25 (quoting *Riley*, 252 F.3d at 773) (Smith, J., dissenting)). In *Stevens*, however, this Court identified several *qui tam* statutes passed by the First Congress that imposed no

Second, in holding that the FCA's *qui tam* provisions are consistent with Article III, the Court in *Stevens* expressly *declined* to rely on the theory that a private relator sues as an "agent of the United States." 529 U.S. at 772. The Court instead observed that the relator's statutory entitlement to a share of any ultimate recovery gives him a concrete *personal* stake in the disposition of the suit, *ibid.*, and the Court concluded that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," *id.* at 773. The core premise of petitioners' Article II challenges—*i.e.*, that the FCA's *qui tam* provisions effectively vest relators with *governmental* power (see, *e.g.*, Pet. 25, 27)—is inconsistent with the *Stevens* Court's emphasis on the claimant's personal stake in the litigation.

b. Even if the constitutional questions presented in the petition otherwise warranted this Court's review, the instant case would be an unsuitable vehicle for resolving them. The government was granted leave to intervene in this case, and its interests were thereafter represented by attorneys with the Department of Justice. Under those circumstances, it is particularly clear

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such requirement. See 529 U.S. at 777 n.6. Indeed, some of those statutes dealt with wrongful conduct that by its nature would have no individual victim. See *ibid.* (citing statutory provisions authorizing informers to sue concerning, and to recover half the fine for, failure to file census returns). The Court's description of *qui tam* statutes in *United States ex rel. Marcus* v. *Hess*, 317 U.S. at 541 n.4, and *Marvin* v. *Trout*, 199 U.S. at 225 (quoted at p. 17, *supra*), is similarly inconsistent with petitioners' characterization of early examples of the *qui tam* mechanism. And if the early statues had required a showing of injury to the relator, they would have been irrelevant to the Article III question addressed in *Stevens*, which concerned the standing of a relator who had *not* suffered such an injury. See *id.* at 773.

that Stone as a *qui tam* relator did not exercise governmental power. Indeed, with respect to petitioners' challenge under the Take Care Clause, the court of appeals limited its holding to FCA cases in which the government seeks and is granted leave to intervene. See Pet. App. 27a-29a & n.6.

c. Petitioners' claim under the Appointments Clause (Pet. 24-27) lacks merit. Although a statutory designation is not dispositive of the constitutional question, cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392-393 (1995); *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989), it is notable that the FCA does not purport to "establish[] by Law" an "Office[]" of informer or relator, nor does it otherwise express an intent that relators be treated as part of the federal government or exercise federal governmental authority as such. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. 3730(b).

*Qui tam* relators also do not possess the practical indicia of federal officers. This Court has explained that the concept of "Officer" "embrace[s] the ideas of tenure, duration, emolument, and duties." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); see *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (constitutional definition of "Officer" requires a continuing and formalized relationship of employment with the Government); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1879) (same). A *qui tam* relator does not have any tenure, and his role has no prescribed duration. Rather, the relator's role is limited in time, confined to a particular case, and essentially personal in nature, stemming from his capacity as a plaintiff pursuing what is, in essence, a partially assigned claim. Neither the relator nor his attorney in conducting *qui tam* litigation has any duty to

subordinate the relator's interest to that of the government should a conflict between those interests arise. Rather, the task of representing the United States in FCA litigation is entrusted to attorneys with the Department of Justice, who can and do contest legal and factual representations made by relators in *qui tam* actions.

Insofar as the Appointments Clause is concerned, because the FCA can reasonably be regarded as effecting a partial assignment of a claim, a *qui tam* relator is more aptly analogized, not to a Justice Department attorney who represents the United States in litigation, but to a plaintiff who asserts a private right of action under a federal statute. Congress's decision to authorize private lawsuits may often rest in part on its belief that such actions will vindicate a societal interest in deterring and remedying violations of federal law. As with plaintiffs who sue under other federal statutes, the potential for *qui tam* relators to furnish practical assistance in the enforcement of federal law does not transform them into "Officers of the United States" whose selection is governed by the Appointments Clause.

Petitioners' reliance (Pet. 24, 26) on this Court's decisions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and *Edmond* v. *United States*, 520 U.S. 651 (1997), is misplaced. Both of those cases involved the exercise of federal power by government officials who had been appointed to positions of continuing responsibility and tenure. See *Buckley*, 424 U.S. at 109-113, 137-143 (members of the Federal Election Commission); *Edmond*, 520 U.S. at 653 (judges on the Coast Guard Court of Criminal Appeals). Those cases presented no question whether a private individual who has received no formal government appointment, but has been assigned

a personal stake in a claim and been authorized by federal law to exercise significant practical prerogatives with respect to that claim, might be regarded for purposes of the Appointments Clause as an "Officer[] of the United States." For the reasons given above, a *qui tam* relator having such attributes is not an Officer of the United States.

d. The FCA's *qui tam* provisions likewise do not unconstitutionally impair the President's performance of his duties pursuant to the Take Care Clause. Petitioners contend (Pet. 27-30) that the Act's *qui tam* provisions are invalid because relators may initiate suits that the Executive Branch has chosen not to pursue and may oppose the Executive Branch's litigation strategy even after the government intervenes. "[I]n determining whether the [FCA] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). For at least three reasons, petitioners' claim under the Take Care Clause lacks merit.

i. Private plaintiffs are frequently authorized to file civil actions under federal law even when government officials believe that no violation has occurred. See, *e.g.*, 42 U.S.C. 2000e-5(f)(1) (private plaintiff may file Title VII action if charge of unlawful employment discrimination is dismissed by the Equal Employment Opportunity Commission). Nor is it unusual for private parties in litigation to assert legal or factual positions that differ from those of the United States, even when the private and governmental parties agree as to the proper ultimate disposition of the case. Thus, the conduct through which the relator in this case is alleged to have inter-

fered with the functioning of the Executive Branch—*i.e.*, filing documents in judicial proceedings in which the relator had a concrete stake in the outcome—is not the sort of activity that ordinarily raises separation-of-powers concerns.

ii. The FCA vests the Attorney General with substantial authority to resist uses of the *qui tam* mechanism that disserve the interests of the United States. The FCA authorizes the Attorney General to terminate a *qui tam* case through settlement or otherwise, and it makes any settlement between the relator and the defendant contingent on the Attorney General's approval. 31 U.S.C. 3730(c)(2)(A)-(C); see *Ridenour* v. *Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir.), cert. denied, 126 S. Ct. 341 (2005); *Swift* v. *United States*, 318 F.3d 250, 251-252 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003); *Juliano* v. *Federal Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990), aff'd, 959 F.2d 1101 (D.C. Cir. 1992) (Table). If the Attorney General initially declines to intervene in the suit, the court "may nevertheless permit the government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). On the government's motion, the district court may limit the relator's right to call, examine, or cross-examine witnesses, or otherwise to participate in the litigation. 31 U.S.C. 3730(c)(2)(C). And whether or not the government intervenes in the action, the trial court may stay discovery "upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prose-

cution of a criminal or civil matter arising out of the same facts." 31 U.S.C. 3730(c)(4).[3]

iii. The FCA grants the *qui tam* relator no role whatever in formulating the government's *own* litigation strategy. Rather, the decision whether the government will intervene in a *qui tam* suit, and the conduct of the litigation on behalf of the United States if the government chooses to intervene, is entrusted solely to officials within the Executive Branch. For that reason, petitioners' reliance (see Pet. 27, 29-30) on *Morrison* v. *Olson*, 487 U.S. 654 (1988), is misplaced. The law at issue in *Morrison* provided that, in a specified category of cases, an individual appointed by a federal court and not subject to the President's complete control could exercise the investigative and prosecutorial authority of the United States. See *id.* at 660-663. Under the FCA's *qui tam* provisions, by contrast, a relator does not litigate as the United States. That is particularly clear in *qui tam* suits, like this one, in which the United States intervenes as a party and is thereafter represented by Department of Justice attorneys. See pp. 18-19, *supra*.

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[3] In contending that the FCA's *qui tam* provisions violate the Take Care Clause, petitioners observe (Pet. 28-29) that the relator remains a party to the suit even after the government intervenes and may oppose the government's preferred disposition of the case. In the instant case, however, the Attorney General did not seek dismissal of Stone's causes of action, his removal from the case, or any limits on the scope of his participation. Because Stone's participation in *this* case did not intrude impermissibly upon the prerogatives of the Executive Branch, any constitutional issues that might be raised by the FCA's application in other settings would provide no basis for reversal of the court of appeals' judgment.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006

(5)

No. 05-1272

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

In the

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP.
AND BOEING NORTH AMERICAN, INC.

*Petitioners,*

v.

UNITED STATES OF AMERICA

AND

UNITED STATES *EX REL.* JAMES S. STONE

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## RESPONDENT JAMES S. STONE'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether the Court should review the Tenth Circuit's factbound determination, affirming the decisions of two district court judges in this 17 year-old case, that the *qui tam* plaintiff qualifies as an "original source" under the False Claims Act, 31 U.S.C. § 3730(e)(4), under the particular facts of this case.

Whether the Court should review petitioners' constitutional challenges, pursuant to the Appointments and Take Care Clauses of Article II, to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, in the absence of a conflict of authority or indeed any relevant case law support at all.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

PRELIMINARY STATEMENT ..... 1

COUNTERSTATEMENT OF THE CASE ..... 2

A. Mr. Stone's Direct and Independent Knowledge Leads to a Criminal Investigation and This Lawsuit ..... 2

B. Rockwell's Criminal Guilty Plea ..... 5

C. Relevant Proceedings Below ..... 6

1. Rockwell's Motion to Dismiss ..... 6

2. The Government's Intervention ..... 7

3. The Amended Complaint ..... 8

4. The Trial and Jury Verdict ..... 9

5. Post-Trial Motions ..... 9

6. Appeals ..... 10

7. Limited Remand and Affirmance ..... 12

REASONS FOR DENYING THE PETITION ..... 13

I. PETITIONERS' FACTBOUND ORIGINAL SOURCE ARGUMENT DOES NOT MERIT REVIEW ..... 13

A. The Tenth Circuit Correctly Applied Settled Principles of Law to the Particular Facts of This Case ..... 15

B. There Is No Circuit Conflict ..... 17

C. Review By This Court Would Not Affect the Outcome of This Case ..... 25

II. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE NOT SUPPORTED BY ANY COURT DECISION AND DO NOT MERIT REVIEW ..... 27

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

### CASES

*Buckley* v. *Valeo*, 424 U.S. 1 (1976) ..... 28

*Comstock Resources, Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005) ..... 14

*Cooper* v. *Blue Cross & Blue Shield of Florida Inc.*, 19 F.3d 562 (11th Cir. 1994) ..... 19, 20

*Edmond* v. *United States*, 520 U.S. 651 (1997) ..... 28

*Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005) ..... 14

*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923) ..... 18, 27

*Minnesota Association of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2000), *cert. denied*, 537 U.S. 944 (2002) ..... 17, 20

*Morrison* v. *Olson*, 487 U.S. 654 (1988) ..... 28, 29

*Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) ..... 26

*Riley* v. *St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) ..... 28

*Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993) ..... 24

*Seal 1* v. *Seal A*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) ..... 23

*United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999)..... 18, 22

*United States ex rel. Barth* v. *Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995) ..... 18

*United States ex rel. Cosens* v. *Yale-New Haven Hosp.*, 233 F. Supp. 2d 319 (D. Conn. 2002) ..... 26

*United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996)..... 15

*United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999).....11, 15, 17

*United States ex. rel. Kelly* v. *Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) ..... 28

*United States ex rel. King* v. *Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), *cert. denied*, 510 U.S. 1140 (1994) ..... 11

*United States ex rel. Laird* v. *Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 21

*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) ..... 26

*United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000)..... 26

*United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) .....18, 23, 25

*United States ex rel. Springfield Terminal Railway Co.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 17, 20, 26

*United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P. A.* v. *Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 18

*United States ex rel. Taxpayers Against Fraud* v. *General Electric Corp.*, 41 F.3d 1032 (6th Cir. 1994) ..... 28

*United States* v. *MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996) ..... 15

*Vermont Agency of National Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 27

*Watson* v. *Blankinship*, 20 F.3d 383, 387 (10th Cir. 1994) ..... 16

*Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813 (1931) ..... 13

**CONSTITUTIONAL PROVISIONS**

U.S. Constitution, Art. II, § 2 ..... 27

U.S. Constitution, Art. II, § 3 ..... 28

**STATUTES**

31 U.S.C. §§ 3729-33 ..... 1

31 U.S.C. § 3730 ..... *passim*

## OTHER MATERIALS

S. Ct. R. 10 ..... 13

Brief for the United States as *Amicus Curiae*, *Comstock Resources, Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005) (No. 04-165), 2005 WL 1254202 ..... 14, 18

S. Rep. No. 99-345 (1986) (Conf. Rep.) ..... 17, 26

## RESPONDENT JAMES S. STONE'S BRIEF IN OPPOSITION

## PRELIMINARY STATEMENT

Rockwell's petition boils down not to a circuit conflict, as Rockwell tries to create, but rather simply to a dispute about the particular facts of this 17-year-old case, which Rockwell lost before a jury in 1999. James S. Stone, an 81-year-old retired Rockwell engineer, has proven his status as a proper *qui tam* relator time and time again since filing this lawsuit in 1989, by presenting evidence that he had direct and independent knowledge of the facts underlying his claim that Rockwell violated the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"). The Government consistently has maintained that Mr. Stone is a proper FCA plaintiff, and the court of appeals and district court have so held based on the parties' evidentiary submissions and a full pretrial and trial record. Factbound determinations such as this do not merit the Court's review.

Nor are Rockwell's constitutional arguments based on a discernible conflict of authority. Indeed, Rockwell has not cited a single FCA case holding that the *qui tam* provisions violate the Appointments and Take Care Clauses. Not only is there no conflict of authority, but there is no authority to support Rockwell's constitutional claims at all.

Finally, review by this Court would not change the outcome of this case, as Rockwell is liable to the Government for the full amount of the $4.2 million judgment, regardless of Mr. Stone's relator status. Mr. Stone's share of the judgment is a matter between him and the Government, and does not affect Rockwell's interest. For this reason too, review should be denied.

## COUNTERSTATEMENT OF THE CASE[1]

Mr. Stone, an 81-year old retired engineer, commenced this action in July 1989 under the *qui tam* provisions of the FCA, alleging that Rockwell had made false statements to the Government in connection with its environmental, safety and health ("ES&H") activities at the Rocky Flats nuclear weapons facility outside Denver, Colorado ("Rocky Flats" or "the Plant"). (Pet. App. 4-5a.)[2] Based in part on submissions by Mr. Stone, the United States intervened in the action in 1996. (*Id.* 8a; CA App. 905.) In 1999, Mr. Stone and the Government jointly tried the case to a twelve-member jury in a six-week trial. On April 1, 1999, the jury returned a verdict for plaintiffs under the FCA, and the district court (Matsch, C.J.) entered final judgment in favor of Mr. Stone and the Government in the amount of $4,172,327. (Pet. App. 9-10a, 68a.)

Rockwell's petition itself demonstrates the factbound nature of this case. And those facts establish – as the court of appeals and district court have held – Mr. Stone's proper status as a *qui tam* plaintiff in this fully-litigated case. Specifically:

### A. Mr. Stone's Direct and Independent Knowledge Leads to a Criminal Investigation and This Lawsuit

Following 30 years of engineering experience and several patented inventions, Mr. Stone was employed by

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[1] Mr. Stone disagrees with petitioners' statement of the facts.

[2] Citations to the petition and appendix are denoted as "Pet." and "Pet. App." Citations to Mr. Stone's appendix are denoted as "Resp. App." The Appellant's Appendix before the Tenth Circuit is denoted as "CA App." and references to the trial transcripts found therein in Volumes VII through IX are to the transcript pages and are denoted as "Tr." Appellee/Cross-Appellant James S. Stone's Supplemental Appendix before the Tenth Circuit is denoted as "SA."

Rockwell at Rocky Flats from November 1980 through March 1986 as Principal Engineer in Rockwell's Facilities, Engineering, and Construction Division and, later, as Lead Principal Engineer in the Utility Design Department. (Pet. App. 3a, 17a; Resp. App. 2a.) Given his broad and lengthy experience, Mr. Stone's job for Rockwell consisted of plant-wide "troubleshooting" to identify and devise solutions to engineering problems, including those arising in Rockwell's ES&H operations. (Pet. App. 17-18a; Resp. App. 2a.) Projects to which Mr. Stone was assigned at Rocky Flats included waste treatment through a cementation process used to remove and solidify pond sludge and salt wastes to produce "pondcrete" and "saltcrete," sewage treatment plant operations, the spray irrigation wastewater disposal system, and plutonium processing and beryllium machining operations. (Pet. App. 18a; Resp. App.3-11a.) While working on these projects, Mr. Stone observed serious ES&H problems associated with each of these areas. (Pet. App. 18a; Resp. App. 6-8a, 19a, 25a (pondcrete/saltcrete); *id.* 3-4a (sewage treatment plant); *id.* 4-6a, 17-18a (spray irrigation); *id.* 8-10a (plutonium); *id.* 11a, (beryllium); *id.* 14a (observations made firsthand).)

Mr. Stone also knew that Rockwell was being paid under its contract based on false claims. As the evidence below showed, Mr. Stone knew that Rockwell's profits for its operation of the Plant consisted principally of award fee bonuses, and during his employment Mr. Stone reviewed documents describing the manner by which those bonuses were determined. (Resp. App. 12a, 20-23a.) Mr. Stone specifically knew that Rockwell's award fee bonuses were based in part on its satisfactory performance in various ES&H areas, including "Environmental Protection" and "Waste Management," and that Rockwell was required to report ES&H problems to the Department of Energy ("DOE"). (*Id.* 12a.)

Although Mr. Stone reported ES&H problems he observed to Rockwell management, he and other Rockwell

employees were specifically instructed not to discuss those problems with DOE personnel. (Resp. App. 12-13a.) Nor did Rockwell's management take actions to address those problems. (*Id.* 6-11a.) At the same time, Mr. Stone observed that Rockwell continued to receive award fee evaluations and lucrative bonuses that did not reflect the existence of the ES&H problems he had reported to Rockwell management. (*Id.* 12a.)

In the three years following the termination of his employment by Rockwell, and before any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily met and spoke on multiple occasions with the Federal Bureau of Investigation ("FBI") and the Environmental Protection Agency ("EPA") (CA App. 457-71; Resp. App. 13-14a), a fact Rockwell conveniently ignores in its petition. In those meetings, Mr. Stone reported the ES&H problems he had observed at Rocky Flats, including problems with pondcrete and spray irrigation; turned over 2,300 pages of related documents from the Plant; identified other present and former Rockwell employees with knowledge of these problems; and advised the Government regarding sources of additional documents. (Resp. App. 13a.) Among the documents Mr. Stone provided to the Government was an October 13, 1982 Engineering Order in which he stated, with respect to the manufacturing process for pondcrete: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . ." (Pet. App. 51a; Resp. App. 19a.) As the court of appeals would later find, this Engineering Order "was explicit in articulating his belief that the proposed design for making pondcrete was flawed . . . . Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." (Pet. App. 18a.) It is undisputed that Rockwell produced pondcrete that was unstable and caused hazardous wastes to leach into the environment. (CA App. 1869-70.)

Following these meetings, in June 1989, the FBI and EPA executed a search warrant at the Plant.[3] (Pet. App. 4a.) The search warrant was based on an affidavit signed by the same FBI agent with whom Mr. Stone had met. (CA App. 778.) The Justice Department's Criminal Division convened a grand jury to proceed with the investigation. (*Id.* 909.)

Almost simultaneously, but after first providing his information to the Government, Mr. Stone commenced this action in July 1989 under the *qui tam* provisions of the FCA alleging that Rockwell had misrepresented the status of its ES&H performance to the Government in order to induce payments under its DOE contract. (CA App. 81, 89-93.) As required by the FCA, Mr. Stone's complaint was filed under seal and thus was not served on Rockwell at that time, and Mr. Stone provided his complaint and a lengthy disclosure statement to the Government outlining additional information underlying his allegations, including information specifically relating to pondcrete and spray irrigation. (*Id.* 491-561; Resp. App. 15a, 24-26a.)

### B. Rockwell's Criminal Guilty Plea

On March 26, 1992, after several years of investigation, Rockwell entered into a plea agreement with the Justice Department's Criminal Division under which it pleaded guilty to ten environmental crimes arising from Rockwell's pondcrete, saltcrete and spray irrigation operations at Rocky Flats – matters already addressed by Mr. Stone and alleged in his FCA

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[3] Petitioners, relying on inadmissible hearsay statements from alleged Justice Department sources made at the time of the criminal case against Rockwell, argue that the Government did not view Mr. Stone as a whistleblower. (Pet. 10-11.) These statements do not negate Mr. Stone's direct and independent knowledge. Furthermore, the Government has consistently stated in this case that it views Mr. Stone as an original source. (SA 26.)

complaint and disclosure statement – and agreed to pay $18.5 million in criminal fines. (CA App. 1861-92; Pet. App. 7a.) Significantly, the plea agreement specifically excluded Rockwell's liability in Mr. Stone's FCA action. (CA App. 1889.)

### C. Relevant Proceedings Below

#### 1. *Rockwell's Motion to Dismiss*

In late 1992, Rockwell moved to dismiss Mr. Stone's action under the direct and independent knowledge prong of the original source rule, arguing that Mr. Stone did not identify the specific documents containing the false claims or statements and the persons who submitted them. (CA App. 116-36.) Rockwell did not contest that Mr. Stone voluntarily provided his information to the Government prior to his filing suit. (*Id.*)

In response, Mr. Stone submitted a lengthy sworn affidavit with attachments explaining his role as a principal engineer for Rockwell and his knowledge gained in that role of ES&H problems at the Plant, including those relating to ponderete, spray irrigation, sewage treatment, plutonium and beryllium operations, which he reported to Rockwell management (Resp. App. 2-11a); and that Rockwell's compensation consisted primarily of award fee bonuses the amount of which was determined by its performance in various areas, including ES&H matters (*id.* 12a, 20-23a). Mr. Stone further explained that he provided this information, as well as documents from the Plant, to the FBI and EPA over a three-year period and continued to work with these investigative authorities through 1989 *before* he filed this FCA suit. (*Id.* 13-15a; CA App. 457-71.)

Significantly, in submissions to the district court, Rockwell acknowledged Mr. Stone's direct and independent knowledge in these areas:

> At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination; *that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment;* that plutonium "gloveboxes" were leaking and lacked necessary filters; and that the beryllium machine shop was contaminated with hazardous levels of beryllium.

(CA App. 578 (citations omitted, emphasis added); *id.* 567 ("Stone's assertion that he told the FBI/EPA about ES&H 'problems' at Rocky Flats is, on the other hand, accurate.").)

On February 2, 1994, the district court (Carrigan, J.) denied Rockwell's motion to dismiss. The court found, based on the factual record submitted, that Mr. Stone had firsthand knowledge of ES&H problems acquired through his role as plant troubleshooter, that Mr. Stone knew that Rockwell's compensation was based on its compliance with ES&H standards and that Rockwell's compensation would be adversely affected if it did not perform appropriately in these areas, and that Mr. Stone was instructed by Rockwell management not to divulge ES&H problems to DOE. (Pet. App. 61a.) Thus, the court concluded, "Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." (*Id.*)

### 2. *The Government's Intervention*

In 1995, the Government moved to intervene in Mr. Stone's action, explaining that it had obtained information

through "a separate proceeding[4] as well as material submitted to the Government by Mr. Stone" confirming Mr. Stone's FCA allegations and, in particular, those concerning Rockwell's misrepresentations as to the solidification of wastes through the pondcrete/saltcrete process and its improper spray irrigation practices. (CA App. 900, 905.) Finding good cause, the district court (Matsch, C.J.) granted the motion, and that ruling is not challenged here. (Pet. App. 8a; CA App. 964-71.)

### *3. The Amended Complaint*

Mr. Stone and the Government jointly filed an Amended Complaint on December 20, 1996, alleging, in Count One, FCA violations in connection with Rockwell's pondcrete, saltcrete, and spray irrigation waste treatment operations. (CA App. 979-91.) The Government alleged additional common law claims, and Mr. Stone separately alleged an FCA claim relating to Rockwell's plutonium operations.[5] (*Id.* 996-1004.)

Specifically, plaintiffs alleged that, due to defective design and manufacturing, a substantial number of the pondcrete and saltcrete blocks Rockwell manufactured and stored outdoors were unstable and, as a result, hazardous materials leached onto the pads under the blocks and the surrounding area. (CA App. 982, 984.) With respect to spray irrigation, plaintiffs alleged that Rockwell improperly disposed of wastewater from plutonium operations and the sewage treatment plant by

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[4] After Rockwell was dismissed as contractor at Rocky Flats, Rockwell sued the Government in the Court of Federal Claims for amounts allegedly due under its contract. The Government has defended the case on the ground, among others, that Rockwell committed fraud as contractor at the Plant. (CA App. 903-904.)

[5] Mr. Stone's plutonium claim, which the Government did not adopt, was severed by the district court and has never been tried. (Pet App. 8-9a.) Thus, following trial, the district court entered judgment pursuant to Fed. R. Civ. P. 54(b). (Pet. App. 68a)

spraying it on the fields surrounding Rocky Flats, which wastewater ran into and polluted Woman Creek and other nearby water supplies. (*Id.* 988-89.) Plaintiffs contended that Rockwell failed to report these environmental conditions to the Government, resulting in the fraudulent receipt of award fees under Rockwell's DOE contract. (CA App. 989-991.) These claims were further detailed in the extensive discovery proceedings, and summarized in the final pre-trial order. (CA App. 1076-95.)

*4. The Trial and Jury Verdict*

Plaintiffs' pondcrete, saltcrete and spray irrigation claims were presented jointly by Mr. Stone and the United States to a twelve-member jury during a six-week trial. On April 1, 1999, the jury returned a verdict finding that Rockwell made false statements in violation of the FCA for the three award fee periods from April 1, 1987 through September 30, 1988. (CA App. 1119-20.) The jury awarded damages in the amount of $1,390,775.80, which, under the treble damage provision of the FCA, resulted in a final judgment of $4,172,327.40. (Pet. App. 10a, 68a.)[6]

*5. Post-Trial Motions*

After the jury verdict, Rockwell argued that the district court should not enter judgment in favor of Mr. Stone because he was not an original source. (CA App. 1135-54.) On May 5, 1999, Rockwell also, for the first time, asked for a ruling on the constitutionality of the *qui tam* provisions. (*Id.* 1459.) In response, the Government agreed with Mr. Stone that the district court's 1994 original source ruling was correct and should not

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[6] The jury did not find liability for other award fee periods, and found for Rockwell on the Government's common law claims. The district court, in accordance with the FCA, also assessed civil penalties in the amount of $15,000.00. (Pet. App. 10a, 68a.)

be revisited. (SA 23-26; CA App. 1408.) As the court of appeals later noted, "the United States did not contend in the district court that Mr. Stone had failed to make the necessary disclosures to the Government." (Pet. App. 51a, n.5.) To the contrary, the Government stated that "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests," and that the Government did not question Mr. Stone's proper status as a *qui tam* plaintiff in this case. (SA 26.)

The district court denied Rockwell's renewed motion to dismiss on original source grounds and also rejected Rockwell's constitutional arguments, and entered final judgment in favor of both plaintiffs on May 13, 1999. (Pet. App. 66-68a.) The court correctly noted that Rockwell had no stake in the amount of recovery to which Mr. Stone is entitled, because Rockwell must pay the full verdict to the Government in any event. (SA 124.) The district court also denied plaintiffs' motion for a new trial on damages (SA 75) and entered an amended final judgment in favor of both plaintiffs on June 10, 1999.[7]

*6. Appeals*

Rockwell appealed on various grounds, including the "original source" issue, and cross-appeals were filed by Mr. Stone and the Government on the damages issue. The Government also appealed from the dismissal of its common law claims. Significantly, with respect to the original source issue, Rockwell did not contest the facts in the record showing

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[7] Respondents sought a new trial on damages based on the district court's admission of prejudicial testimony of Rockwell's "expert" regarding environmental damages at other DOE plants. (SA 29-45.) In addition to award fees, plaintiffs had sought as damages the millions of dollars in costs expended by the Government to clean up the environmental damage resulting from Rockwell-produced ponderete and salterete. (CA App. 1065.)

that Mr. Stone had provided documents and information to the Government regarding pondcrete and spray irrigation prior to filing this suit.

On September 24, 2001, in an opinion authored by Judge Holloway, a Tenth Circuit panel majority affirmed the district court's rulings in their entirety and dismissed all cross-appeals. The court of appeals held that the district court had correctly determined that Mr. Stone was an original source, because he had direct and independent knowledge of the facts underlying his claims. The court specifically held that Mr. Stone's prediction in his 1982 Engineering Order that the pondcrete process would not work, among other record evidence, constituted direct and independent knowledge of the pondcrete claim as to which Rockwell was found liable. (Pet App. 17-20a.)

Judge Briscoe dissented. The dissent did not take issue with the panel majority's articulation of the direct and independent knowledge requirement, but rather with the majority's application of the law to the facts of this case. (Pet. App. 44-48a.)

On November 2, 2001, Rockwell filed a petition for rehearing and rehearing *en banc* on the question whether Mr. Stone had satisfied the two prongs of the original source rule. Tellingly, Rockwell sought to justify rehearing and rehearing *en banc* by arguing that the decision of the court of appeals below created an *intra*-circuit split with two other Tenth Circuit decisions, *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), and *United States ex rel. King* v. *Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001), *cert denied*, 535 U.S. 905 (2002), concerning the direct and independent knowledge and pre-filing disclosure prongs, respectively.

On March 4, 2002, the Tenth Circuit rejected Rockwell's intra-circuit split argument and reaffirmed its ruling that, in line

with *Hafter*, Mr. Stone had direct and independent knowledge of the information on which his allegations were based. (Pet. App. 15-22a.) The panel, however, issued an amended opinion and directed a limited remand on the factual issue of whether Mr. Stone had satisfied the second prong, *i.e.*, whether he voluntarily provided his information to the Government before filing this FCA action. (*Id.* 22-23a, 43-44a.) The court of appeals affirmed all of the remaining rulings in their entirety, including the ruling that the FCA does not violate Article II of the Constitution. (*Id.* 43-44a.) The suggestion for rehearing *en banc* was denied. (*Id.* 1a.)

### *7. Limited Remand and Affirmance*

On limited remand, the district court received submissions from the parties concerning the information Mr. Stone provided to the Government prior to the filing of this action. (Pet. App. 50a.) On December 17, 2002, the district court issued an order making certain findings of fact, but no conclusions of law. (*Id.* 50a, 75a.) In its order, the district court specifically found that Mr. Stone provided to the Government documents relevant to the ES&H matters at issue, including his Engineering Order related to pondcrete, prior to bringing this suit. (Pet. App. 73a.)[8]

Following the remand proceedings and after further briefing, on March 5, 2004, the Tenth Circuit reaffirmed the judgment of the district court in all respects as set forth in its

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[8] The district court declined to consider additional affidavits submitted by Mr. Stone and his counsel regarding Mr. Stone's meetings with the FBI. Mr. Stone appealed from that order. Following the Tenth Circuit's decision on the main appeal, the Tenth Circuit denied as moot Mr. Stone's motion to supplement the record to include the affidavits and the second appeal was held in abeyance. (Pet. App. 53a.) Were this case to be reviewed by the Court, the matter of these additional affidavits may need to be addressed by the courts below.

previous opinion. (Pet. App. 52-53a.) Judge Briscoe again dissented, for the same reasons as in her prior dissent.[9]

On April 16, 2004, Rockwell filed another petition for rehearing and rehearing *en banc*, contending, once again, that the Tenth Circuit's decision presented an *intra*-circuit conflict with *King* as to the pre-filing disclosure issue. On January 4, 2006, the Tenth Circuit denied Rockwell's second petition. (Pet. App. 57a.) On April 4, 2006, Rockwell filed its petition for a writ of certiorari.

## REASONS FOR DENYING THE PETITION

### I. PETITIONERS' FACTBOUND ORIGINAL SOURCE ARGUMENT DOES NOT MERIT REVIEW

At bottom, Rockwell's petition challenging Mr. Stone's original source status takes issue only with the application of a properly stated rule of law to the particular facts of this case, which is not a basis for this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). In an attempt to overcome this obvious shortcoming, Rockwell tries to conjure a conflict of authority about what amount of "direct" knowledge a *qui tam* relator must have under 31 U.S.C. 3730(e)(4)(B), but, significantly, no court of appeals has recognized such a conflict, and there is none. *See Wisconsin Elec. Co.* v. *Dumore Co.*, 282 U.S. 813, 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.") (citation omitted).

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[9] Judge Politz, sitting by designation from the Fifth Circuit, passed away before the Tenth Circuit's second decision following remand, and was replaced by Judge Hartz.

The FCA statute clearly defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit did in this case, all circuits apply a fact-intensive analysis to determine whether a particular *qui tam* plaintiff is an original source under the plain language of the statute. *See* Brief for the United States as *Amicus Curiae*, *Comstock Res., Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005) (No. 04-165), 2005 WL 1254202, at *13, ("A sensible application of the 'original source' requirement in Section 3730(e)(4)(B) must take into account [many] considerations. No single brightline test will be adequate to resolve all cases in light of the widely varying fraudulent schemes that may give rise to *qui tam* actions.").[10]

Below, both the district court and the court of appeals performed the analysis required by the FCA and concluded that Mr. Stone was an original source based on the facts of this case. Rockwell's petition is simply a disagreement with the result of that factbound analysis, which is not a basis for this Court's review.

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[10] Rockwell argues that the Court's denial of certiorari last year in *Comstock Resources, Inc.* v. *Kennard*, 125 S. Ct. 2957 (2005), another FCA case from the Tenth Circuit, does not indicate that the Court should deny its petition because "[t]his case goes further." (Pet. 23.) In fact, however, this case is less certworthy than *Comstock*. First, the relators in *Comstock* were not employees, like Mr. Stone, involved in the very issues that formed the basis for the action. *See Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1040-41 (10th Cir. 2004). Second, the Government did not intervene in *Comstock* and thus was unable to protect its interests in the way it has been able to do here. And third, review of this case would not affect Rockwell's liability, as it is liable to the Government in any event for the full amount of the judgment. In short, nothing about Rockwell's petition presents a more persuasive case for review than *Comstock* did.

### A. The Tenth Circuit Correctly Applied Settled Principles of Law to the Particular Facts of This Case

After considering Rockwell's arguments on appeal – and again in Rockwell's petitions for rehearing – the Tenth Circuit twice has affirmed the district court's ruling that Mr. Stone's knowledge of Rockwell's environmental frauds was direct and independent, as required by the FCA. (Pet. App. 1a, 17a.) Significantly, in none of its decisions did the court of appeals acknowledge any conflict of authority. Because there is none.

In the decision below, the court of appeals began by setting forth the relevant legal standard, which Rockwell does not (and cannot) contest.

> We have explained that for purposes of determining whether a relator qualifies as an original source, the FCA's direct and independent knowledge requirement is properly construed to mean that the knowledge possessed by the relator must be "marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor." *United States ex rel. Hafter* v. *Spectrum Emergency Care*, 190 F.3d 1156, 1162 (10th Cir. 1999) (quoting *United States* v. *MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996)) (alterations in original). In other words, "direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others," while independent knowledge means that "the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources." *United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) (citation omitted).

(Pet. App. 15a.)[11]

The court of appeals then reviewed the evidence, including Mr. Stone's affidavit describing his trouble-shooting duties at Rocky Flats, his concerns about the manufacturing of pondcrete, and the documents Mr. Stone provided to the Government before he filed this suit. (Pet. App. 17-19a.) The court also reviewed Mr. Stone's confidential disclosure statement to the Government and, specifically, the information concerning pondcrete and Rockwell's concealment of environmental problems at Rocky Flats. (*Id.* 18-20a.) The court held that this factual evidence of direct and independent knowledge was sufficiently specific to satisfy the FCA's requirements under settled case law. (*Id.* 20a.)[12]

The court of appeals was "not persuaded by Rockwell's arguments to the contrary, which are permeated by a flawed understanding of the FCA's definition of direct and independent knowledge." (Pet. App. 20a.) Specifically, the court of appeals rejected Rockwell's contention that a *qui tam* relator "must have direct and independent knowledge of the *actual* fraudulent submission to the government." (*Id.* (emphasis in original).) The court correctly held that the "plain text of the FCA . . .

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[11] The court of appeals properly rejected Rockwell's after-the-fact argument that Mr. Stone was not a proper *qui tam* relator because he was no longer employed by Rockwell during the award fee periods for which Rockwell was found liable. (Pet. App. 21-22a.) Indeed, it would be inappropriate for the jury's verdict in an FCA case retroactively to impact an issue of subject matter jurisdiction. For example, a jury's small monetary verdict cannot retroactively divest a federal court of diversity jurisdiction. *See Watson* v. *Blankinship*, 20 F.3d 383, 387 (10th Cir. 1994). So, too, here with respect to the original source rule.

[12] Contrary to petitioners' contention, the court of appeals did not hold that mere "background information 'underlying or supporting' [the relator's] supposition that a defendant might have engaged in fraud" is sufficient to qualify as a proper *qui tam* relator. (Pet. 15.)

belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess 'direct and independent knowledge of the *information on which the allegations are based*.'" (*Id.* (emphasis in original).)[13] In doing so, the court of appeals followed both the plain language of the statute and the court's prior decision, *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999), on which Rockwell itself had relied. (Pet. App. 20-21a (citations omitted).). A review of the record "convinc[ed] [the court of appeals] that Stone ha[d] been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste." (*Id.* 17a.) Rockwell's disagreement with the result of the court of appeals' straightforward application of law to facts is not a basis for review.

### B. There Is No Circuit Conflict

Rockwell's claim that the Tenth Circuit's original source ruling merits the Court's review because it "deepens an existing circuit split" (Pet. 13) is unfounded.

Indeed, *none* of the cases on which Rockwell relies, from the Third, Eighth, Ninth, Eleventh, and D.C. Circuits, even

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[13] Consistently with the decisions of other courts of appeals, the courts below recognized that a relator need not have knowledge of every detail of every element of an FCA claim (Pet. App. 20-21a); *see Minn. Assoc. of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2000), and, indeed, such a requirement would eviscerate the goal of the FCA to encourage shop floor employees to bring fraud to the attention of the Government. *See United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 650-51 (D.C. Cir. 1994). (stating that the "expressed intention" of the 1986 amendments to the FCA was to "encourage more private enforcement suits") (quoting, S. Rep. No. 99-345, at 23-24 (1986) (Conf. Rep.)).

acknowledges a split (much less a "deepen[ing]" one) as to what constitutes direct and independent knowledge under § 3730(e)(4)(B) of the FCA. The Tenth Circuit does not acknowledge such a split. And neither does the United States. *See* Brief for the United States as *Amicus Curiae*, *Comstock Res., Inc.* v. *Kennard*, *supra*, 2005 WL 1254202 at *9 ("The Tenth Circuit's construction of the term 'original source' is substantially similar to the approaches taken by other courts of appeals.").

As the Court has stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ as improvidently granted). This hardly is such a case.

Tellingly, Rockwell itself did not assert any circuit conflict in the courts below. Indeed, in its first petition for rehearing in the Tenth Circuit, Rockwell cited some of the very cases it now says demonstrate a split, and argued that those very cases were *in line with* the Tenth Circuit's 1999 decision in *Hafter* – and that the court of appeals in this case had erred in deviating from the law in the Tenth Circuit as enunciated in *Hafter*.[14] As Rockwell must concede, this Court should not review any contention as to an intra-circuit split.

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[14] Rockwell cited the following cases: *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P. A.* v. *Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999); *United States ex rel. Barth* v. *Ridgedale Elec., Inc.*, 44 F.3d 699 (8th Cir. 1995); *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999).

In response to Rockwell's then intra-circuit split argument, the court of appeals emphasized that its decision involved an application of law to facts that was in line with the approach taken by the same court of appeals in *Hafter*. (Pet. App. 15-22a; *see also id.* 17a ("Notwithstanding Rockwell's claim that Stone's evidence of his direct and independent knowledge is inadequate to satisfy the specificity we required in *Hafter*, we believe that Stone has adduced sufficient competent proof to establish that he had direct and independent knowledge of the information on which his FCA claim was based.").)

Now, however, Rockwell contends that six decisions, reflecting six applications of the same law to six different sets of facts, make a circuit split. Not so. Although courts have reached different outcomes in cases presenting different sets of facts, that does not represent any conflict of authority on the legal standard. Tellingly, no court of appeals has recognized any such conflict. Rockwell's argument is simply a selective reading of applications of the same law to different sets of facts. It does not merit review.

Indeed, a review of the Eighth, Eleventh, and D.C. Circuit decisions Rockwell cites, which all find the relator to be an original source, demonstrates how alone Rockwell is in its view of a circuit split, and that Mr. Stone meets even Rockwell's articulation of the supposedly different standards.

In *Cooper* v. *Blue Cross & Blue Shield of Florida, Inc.* (Pet. 16-18), the Eleventh Circuit found that the relator's knowledge of alleged fraud by a Medicare secondary payor was "direct" because he had developed his knowledge through "three years of his own claims processing, research and correspondence with members of Congress and [the Health Care Financing Administration]." 19 F.3d 562, 568 (11th Cir. 1994). In a footnote, the court rejected the defendants' contention that Cooper, who, unlike Mr. Stone, was not an employee of the defendant, did not provide substantive information that

"seriously contribute[d] to the disclosure of fraud," explaining that as the "purpose of the FCA was to enlist the public's help in uncovering specifically each and every perpetrator of fraud[,] Cooper's information is potentially specific, direct evidence of fraudulent activity by [Blue Cross]." *Id.* at 568 n.12 (citations omitted). Mr. Stone's detailed, firsthand knowledge of ES&H violations at Rockwell, gained in his role as a Rockwell engineer working on these very matters, is even stronger than the relator's was in *Cooper* and, thus, easily meets *Cooper's* articulation of the requirements of § 3730(e)(4)(B).

The Eighth Circuit's decision in *Minnesota Association of Nurse Anesthetists* v. *Allina Health System Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2000), *cert. denied*, 537 U.S. 944 (2002), also is fully consistent with the Tenth Circuit's decision below. There, after reviewing the factual record, the court concluded that the relators, nurse anesthetists, were proper plaintiffs, where they had personal knowledge that anesthesiologists regularly submitted fraudulent bills to Medicare for anesthesia procedures by virtue of their participation in the procedures and observation of the anesthesiologists' billing practices. *Id.* Like Mr. Stone's knowledge, the nurse anesthetists' knowledge was gained from their own efforts. Even more so than the relators in *Nurse Anesthetists*, Mr. Stone's activities as Plant trouble-shooter and his observation of serious ES&H problems with Rockwell's pondcrete manufacturing process gave him direct and independent knowledge of the true state of facts. Thus, *Nurse Anesthetists* does not help Rockwell either.

*Nurse Anesthetists* cites one case in its discussion, *Springfield*, the D.C. Circuit case Rockwell cites as evidencing a supposed split. (Pet. 19-22.) *Springfield*, too, supports Mr. Stone's position, not Rockwell's. The relator, Springfield Terminal Railway, alleged that Quinn, an arbitrator appointed to arbitrate a dispute between the railroad company and its union, falsified his payment records to the Government by charging for days on which he was not working. *United States ex rel.*

*Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 647-648 (D.C. Cir. 1994). The court observed that "'direct and independent knowledge of information on which the allegations are based' refers to direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at 657. The court held that because

> the pay vouchers and phone records did not themselves suffice to indicate fraud, Springfield had to have bridged the gap by its own efforts and experience. . . . Springfield started with innocuous public information; it completed the equation with information independent of any preexisting public disclosure. As such, Springfield is an original source.

*Id.* Again, Mr. Stone's direct and independent knowledge of ES&H violations and Rockwell's award fee bonuses easily meets this standard.

Rockwell's contention that these cases represent different legal standards is unfounded. Indeed, the Fifth Circuit, in surveying decisions of its sister circuits on what constitutes "direct" knowledge under § 3730(e)(4)(B), cited the decisions in *Stone*, *Nurse Anesthetists* and *Cooper* as examples of three cases in which courts

> look to the factual subtleties of the case before it and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those actually involved in the process of unearthing important information about a false or fraudulent claim.

*United States ex rel. Laird* v. *Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355-56 (5th Cir. 2003). Thus, Rockwell's claim that the Tenth Circuit's decision in the instant

case "irreconcilably conflicts with" *Springfield*, *Nurse Anesthetists*, and *Cooper* (Pet. 16, 20) rings utterly hollow.

The two other decisions on which Rockwell relies, in which the relator was held not to be an original source, likewise do not demonstrate any conflict of authority nor any different standard that would result in a different outcome in this case.

In *United States ex rel. Aflatooni* v. *Kitsap Physicians Services* (Pet. 18-19), the relator, a physician, accused his employers of submitting false Medicare bills to the Government. 163 F.3d 516, 519-520 (9th Cir. 1999). The relator, however, "could not recall the name of any [M]edicare patient who was allegedly charged for unnecessary medical services." *Id.* at 526. Moreover, the relator's knowledge about his employers' billing practices was "specul[ative]." *Id.*[15] Accordingly, the court held that the relator did not have "firsthand knowledge . . . obtained . . . through his 'own labor unmediated by anything else.'" *Id.* at 525. By stark contrast here, Mr. Stone, as a principal engineer for Rockwell at the Plant, was required to – and did – identify problems in the Plant's ES&H operations, and also reviewed documents describing Rockwell's compensation. (Resp. App. 2-3a, 12a.) Mr. Stone's disclosures led to a criminal investigation resulting in a guilty plea, and a jury verdict under the FCA as to the same fraudulent environmental practices. Mr.

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[15] The Tenth Circuit properly rejected Rockwell's argument that Mr. Stone's knowledge of ponderete manufacturing was speculative because he had already left Rocky Flats when production of ponderete began. As the court held, the fact that Mr. Stone did not personally witness the May 1988 spill was "immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing ponderete." (Pet. App. 21a.) Mr. Stone predicted this very problem and knew Rockwell withheld that fact from DOE while it received lucrative bonuses. That clearly qualifies him as an original source and not a "parasitic" relator seeking to benefit from the labors of others.

Stone's first-hand knowledge is simply not comparable to the speculative observations offered by the relator in *Aflatooni*.[16]

Finally, *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376 (3d Cir. 1999) (Alito, J.), *cert. denied*, 529 U.S. 1018 (2000), likewise does not represent any conflict of authority but rather a different factual situation where the relator, unlike Mr. Stone, lacked direct and independent knowledge. Mistick, a construction contractor, alleged that defendants, an architectural firm and the Pittsburgh Housing Authority, defrauded the U.S. Department of Housing and Urban Development by making false claims for the cost of lead based paint abatement work in Pittsburgh public housing. *Id.* at 379. Unlike here, the relator in *Mistick* learned of the alleged misrepresentations from a FOIA request, and from civil discovery in a state court action. *Id.* at 381, 383.[17] The

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[16] Rockwell also argues that there is a Ninth Circuit "exception" in which a "relator's status as an original source . . . is governed by proximate cause concepts." (Pet. 18-19.) In *Seal 1* v. *Seal A*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002), the court held that a *qui tam* relator could qualify as an original source if his disclosures to the Government "triggered' the investigation that led to the publicly disclosed information," even if the relator did not have prior knowledge of that information. *Id.* at 1162 (citation omitted). Mr. Stone's three years of meetings with the FBI and EPA, in which he reported the ES&H problems he had observed, turned over 2,300 pages of related documents from the Plant, identified other present and former Rockwell employees with knowledge of these problems, and advised the agents regarding sources of additional documents (Resp. App. 13-15a), following which a criminal investigation was launched, among other things, plainly would satisfy *Seal 1*.

[17] Though, as Rockwell notes (Pet. 15), the relator in *Mistick* was present for meetings with the defendants, those meetings occurred long after the defendants had agreed upon the original specifications for the lead paint abatement work and several months after Mistick had begun encapsulating the lead paint. *Mistick*, 186 F.3d at 379. Here, Mr. Stone's knowledge existed *before* the ponderete blocks leached *as he had predicted* and before the facts became public.

relator's knowledge in *Mistick* contrasts starkly with Mr. Stone's direct, firsthand knowledge of Rockwell's ES&H violations and the award fee process, gained from Mr. Stone's employment with Rockwell and his independent efforts. Also unlike the relator in *Mistick*, Mr. Stone had several meetings with the FBI and EPA about these matters before there was any public disclosure. The cases simply are not comparable on their facts.

The foregoing demonstrates that the Tenth Circuit requires a *qui tam* relator to have as much knowledge of the facts on which his or her allegations are based as other courts of appeal. Rockwell's contrary argument is based on selective quotation from differing articulations of the same standard; a misleading presentation of Mr. Stone's extensive knowledge of Rockwell's fraud, including his knowledge that there were environmental problems at Rocky Flats, that those problems were not disclosed to the Government and that Rockwell nonetheless continued to receive award bonuses; and on ignoring the fact that neither the FCA nor the case law requires that all the evidence presented at trial be part of the relator's knowledge.

In sum, each of the decisions cited by Rockwell presents nothing other than the application of a clear statutory standard to a particular set of facts. None presents a conflict of authority concerning the legal meaning of the direct and independent knowledge requirement. Although the facts and outcomes of cases may differ, that is not a basis for the Court's review.[18]

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[18] Rockwell's argument – made for the first time in its Petition – that the Tenth Circuit's decision below somehow "conflicts with this Court's reading of similar statutory language" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351 (1993) (Pet. 13), a decision construing the Federal Sovereign Immunities Act, is untenable. Rockwell provides no support for the proposition that an interpretation of a provision in one statute can constitute a decision of "an important federal question in a way that

### C. Review By This Court Would Not Affect the Outcome of This Case

Rockwell's petition should be denied for the additional reason that it raises no issue that would impact the outcome of this case. As shown above, Mr. Stone would meet even Rockwell's articulation of the standard in other circuits. But even putting this aside, review of Mr. Stone's relator status would not affect the outcome of this case because Rockwell is liable for the full amount of the judgment in any event.

The FCA statute makes clear that, where, as here, the Government has intervened in an action, the district court's jurisdiction is established. 31 U.S.C. § 3730 (e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . *unless the action is brought by the Attorney General or* the person bringing the action is an original source of the information.") (emphasis added). Rockwell ignores that the relator's right to share in any recovery obtained by the Government subsequent to intervention is controlled by a separate subsection of the Act, which focuses on the "extent to which the [relator] substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d). Rockwell has no stake in the decision as to what portion of the judgment will constitute Mr. Stone's share. In short, any decision concerning

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conflicts with relevant decisions of this Court" as to another provision in a *different* statute. Certainly *Nelson* has never been relied on in any FCA case – though the dissent in one of the cases Rockwell cites discussed *Nelson* in the context of a provision in § 3730(e)(4) not at issue here. *See Mistick*, 186 F.3d at 395-96 (Becker, C.J., dissenting). Regardless, even if it *were* ever appropriate to consider conflicts between different statutes, this case would not be a suitable vehicle for the Court to consider the issue Rockwell presents. This is the first time Rockwell has ever raised *Nelson* or the Foreign Sovereign Immunities Act, and thus the Court does not have the benefit of lower court review of Rockwell's new argument.

Mr. Stone's status as a relator – which is the crux of Rockwell's petition – will have no impact on Rockwell's liability for the full amount of the judgment in this case. *See United States ex rel. Cosens* v. *Yale-New Haven Hosp.*, 233 F. Supp. 2d 319, 326 (D. Conn. 2002).[19]

The Court should not review a case where the outcome could not be affected and where only the litigants' private concerns are implicated. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit

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[19] Rockwell argues that the outcome here could "foreclose" Mr. Stone's claim for statutory attorney's fees under 31 U.S.C. § 3730(d). (Pet 4, n.5.) The matter of attorney's fees is not before this Court. In any event, Rockwell has no proper interest in invoking the original source provision to prevent a recovery designed to compensate relators and their counsel who provide a public service by aiding the Government in its enforcement of the FCA. *See, e.g., United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (resolving dispute between *qui tam* relators and Government concerning relator's percentage share of the Government's recovery in case in which relator's claims were dismissed prior to settlement). Any contrary view is flatly contradicted by the goal of the FCA, which has always been to harness the energy of the citizenry in the service of the Government. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541-2 n.5 (1943), ("[The FCA] was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons. . . ."), *superseded by statute as recognized in Springfield*, 14 F.3d at 650. The legislative history of the 1986 amendments to the FCA makes it even more apparent that monetary incentives are specifically intended to encourage "any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2 (1986) (Conf. Rep.) *See Springfield*, 14 F.3d at 650 ("'[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. [Accordingly, the Senate bill] increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.'") (quoting S. Rep. No. 99-345, at 1-2 (1986) (Conf. Rep.)).

for the benefit of the particular litigants."); *Layne & Bowler Corp.*, 261 U.S. at 393. For this additional reason, review is wholly unwarranted here.

## II. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE NOT SUPPORTED BY ANY COURT DECISION AND DO NOT MERIT REVIEW

Rockwell's contention that the FCA's *qui tam* provisions violate the Appointments Clause and the Take Care Clause of Article II of the U.S. Constitution was easily rejected by the court of appeals and plainly does not merit review. Not only is there no conflict of authority, but Rockwell does not (and cannot) cite a single FCA holding in support of its argument.[20] Nor would this case be a suitable vehicle for review of this issue, as the Government has prosecuted this case along with Mr. Stone to verdict.

Nevertheless, Rockwell contends that the FCA's *qui tam* provisions violate the Appointments Clause (Art. II, § 2, Cl. 2), which provides the mechanism for appointment of "Officers of the United States." (Pet. 24-27.) Rockwell's argument – made for the first time after trial – is that because *qui tam* relators

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[20] Rockwell's contention that the Court in *Vermont Agency of National Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), "reserved" the issue of the constitutionality of the FCA's *qui tam* provisions under Article II (Pet. 24) is incorrect. The issue was not even raised in that case. In a footnote explaining its holding that "a *qui tam* relator under the FCA has Article III standing," the Court stated that, "[i]n so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3. Petitioner does not challenge the *qui tam* mechanism under either of those two provisions." 529 U.S. at 778 & n.8 (emphasis added). This footnote cannot possibly form the basis for review of this case, where no court of appeals has ever adopted Rockwell's argument.

operate as Government officers, Mr. Stone's conduct of this litigation somehow violates Article II. As the court of appeals held, Rockwell's argument is fundamentally flawed because "*qui tam* relators do not serve in any office of the United States." (Pet. App. 25a.) The court of appeals thus easily dismissed this argument as lacking any support. (Pet. App. 26a ("[W]e, like the other circuits that have considered the question, hold that the FCA's *qui tam* provisions do not contravene the Appointments Clause.") (citing *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) (*en banc*); *United States ex rel. Taxpayers Against Fraud* v. *General Elec. Corp.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex. rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994)).)[21]

Finally, Rockwell contends that the *qui tam* mechanism impermissibly undermines the President's exercise of his constitutional responsibility to "take Care that the Laws be faithfully executed" (Art. II, § 3), thereby violating separation of powers principles. (Pet. 27-30.) Significantly, Rockwell cites no FCA case in support of its novel argument – only dissents from the decisions of courts of appeals rejecting it.[22] (*Id.* 27-

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[21] Rockwell's suggestion that the Court should grant review to "resolve the conflict with" *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *Edmond* v. *United States* 520 U.S. 651 (1997) (Pet. 27), also has no basis. *Buckley* held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed in § 2, cl.2 of that Article." 424 U.S. at 126. As the court of appeals held, *qui tam* relators "do not meet the[] requirements" of an Officer enunciated in *Buckley* and prior Court precedents. (Pet. App. 25-26a.) *Edmond* simply elaborated the bifurcated system of appointments established by Article II, which has nothing to do with this case. (*Id.* 24a.)

[22] Rockwell's suggestion that *Morrison* v. *Olson*, 487 U.S. 654 (1988), conflicts with the decision below (Pet. 30) has no merit either. *Morrison* held that congressional enactments must leave the Executive with enough control over litigation such that "the President is able to perform

28.) Indeed, Rockwell's argument wholly misconstrues the nature of the Executive's constitutional power and of the *qui tam* mechanism, as well as the facts of this case. Here, the Government intervened in the case and has fully protected its interests. All the FCA claims tried to the jury were jointly asserted by the Government and Mr. Stone, and at no time did the Government seek dismissal of any of Mr. Stone's claims, his removal from the case, or any limitation of his participation. The Tenth Circuit, again in harmony with the Fifth, Sixth and Ninth Circuits, correctly rejected Rockwell's argument below. (Pet. App. 28-29a (collecting cases).)[23]

Like its original source argument, Rockwell's constitutional arguments present no basis for review.

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his constitutionally assigned duties." 487 U.S. at 696. Here, as the court of appeals held,

> the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone. . . . [W]e remain unconvinced by Rockwell's contention that the presence of a qui tam relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities.

(Pet. App. 27a (citing *Morrison*, 487 U.S. at 695-96).)

[23] In the face of the unanimous view of the courts of appeals against Rockwell's position and the absence of any controlling Supreme Court decision, Rockwell offers only a 1989 opinion from an assistant attorney general in the Office of Legal Counsel that was never adopted by the Attorney General or Solicitor General. (Pet. 25-30.) Moreover, the opinion was superseded by the Office of Legal Counsel in 1996. (*Id.* 25) No court has ever adopted this position. It cannot possibly create a conflict of authority which does not exist in the courts of appeals.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 89-C-1154-

UNITED STATES OF AMERICA *ex rel.*,
JAMES S. STONE,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.
[ENTERED]
[U.S. DISTRICT COURT]
[March 8, 1993]

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AFFIDAVIT OF JAMES S. STONE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

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STATE OF COLORADO )
: ss.:
COUNTY OF JEFFERSON )

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I am informed that defendant, Rockwell International Corporation ("Rockwell"), has filed a motion with the Court to dismiss my complaint on the ground that I allegedly am not an "original source" of the information on which my action is based. I further understand that, to be an "original source" under the False Claims Act, I must have direct and independent knowledge of information on which the allegations in this

lawsuit are based. Because I have such knowledge and am an original source of the claims here, I submit this affidavit in opposition to Rockwell's motion.

Background

2. I am a registered professional engineer in several states including Colorado and had over 30 years engineering experience when I commenced my employment with Rockwell on November 10, 1980, as a Principal Engineer in Rockwell's Facilities, Engineering and Construction Division at the Rocky Flats Plant located in Golden, Colorado ("Rocky Flats"). In January of 1982, I was promoted to Lead Principal Engineer at Rocky Flats in the Utility Design Department, Facilities Engineering Division. I continued in that position until March 17, 1986, when my employment with Rockwell was terminated.

3. My duties during my six years at Rocky Flats included plant-wide "troubleshooting" and the review of designs and existing operations for safety and cost effectiveness. One of my main responsibilities was to identify plant engineering problems and recommend solutions to management. As a result, during my six-year tenure at Rocky Flats, I was assigned to numerous projects that required me to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. Each project that I worked on was identified by a project number and involved a variety of tasks. I attach as Exhibit A a copy of the daily records that I personally kept during my employment at Rocky Flats. These records show the variety of tasks I performed at Rocky Flats. Each task is identified by the overall project number, and a short description of the specific task. As my daily time records show, and as I explain in greater detail below, many of my assigned tasks related to the claims at issue in this case, as organized and set forth in my Consolidated Answers to Discovery, dated October 27, 1992, and attached as Exhibit B, *i.e.*, claims involving surface and ground water contamination and waste

treatment, storage and disposal; plutonium contamination; and beryllium health and safety issues.[1] In the discussion that follows, I have cross-referenced, where appropriate, the pertinent responses set forth in my Consolidated Answers.

Ground and Surface Water Contamination and Waste Treatment, Storage and Disposal

4. During my employment at Rocky Flats, I obtained direct and independent knowledge of a number of different ground and surface water pollution problems and problems related to waste treatment, storage and disposal. The problems I discuss below in this general area can be divided into the following three general categories: (1) sewage treatment system problems related to toxic waste disposal; (2) spray irrigation; and (3) pondcrete/saltcrete.

5. One of my first projects at Rocky Flats was to review the design of the sewage treatment plant. The sewage treatment plant at Rocky Flats was intended to process only routine biological wastes. Nevertheless, as part of this assignment, I learned that the flows to the sewage treatment plant contained materials which indicated the presence of

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[1] For example, among others, project numbers 308201, 315300, 315332, 325040, 325041, 329670, 338616, 345242, 345244, 365550, 379200, 420129, 420906, 430139, 430211, 430555, 430576, 430707, 440227, 440414, 460014, 460912, 460913 and 470247 include tasks involving ground water contamination, sewage treatment, solar ponds and related waste treatment, storage and disposal issues; project numbers 325063, 328957, 335614, 338601, 338611, 345252, 348342, 360456, 370373, 378029, 388611, 398017, 398138, 400204, 410109, 410300, 410301, 420205, 420219, 420305, 430527, 430601, 430642, 430900, 438139, 440219, 470214, 470304, 490006 and 550499 include tasks relating to gloveboxes, dump valves and plutonium in the air duct exhaust system; and project numbers 310072, 318109, 325056, 328955, 365634, 450003, 450010, 450125, 450917, 450918 and 460552 include tasks involving health and safety issues affecting workers at the beryllium shop.

industrial wastes as well as biological wastes. The industrial wastes at Rocky Flats are very toxic. They are hazardous or radioactive, or a mixture of both, and may be in liquid or solid form. These wastes are generated as part of the Rocky Flats production of nuclear bomb triggers and processing of nuclear materials. I learned of the presence of toxic wastes in the sewage treatment system when I reviewed certain records which reflected a low rate of biological process at the treatment plant and the presence of certain chemicals and metals, both of which indicated the presence of toxic waste. (*See* Exhibit B, Attachment 1, Items 7 & 17)

6. I concluded from this that the toxic wastes that should not have been present in the flows to the sewage treatment plant were killing the bacteria needed to process the biological waste at the sewage treatment plant. I also learned that many of the process buildings at Rocky Flats had laboratory sinks and floor drains that were connected to the drainage system to the sewage treatment plant. In my view, there also may have been broken lines and cross-connections between the toxic and biological waste disposal systems, and infiltration of contaminated ground water. Based on this, I concluded that the flows to the sewage treatment plant included toxic wastes from throughout the plant. (*See* Exhibit B, Attachment 1, Items 7 & 17; *see also id.*, Items 8, 9, 10 & 16)

7. The second general area of ground and surface water problems that I worked on at Rocky Flats had to do with the storage, treatment and disposal of both liquid industrial wastes from Rockwell's plutonium operations and the liquid wastes from the sewage treatment plant. At Rocky Flats, these wastes were sent to "holding" and/or "evaporation" ponds for storage, treatment, and disposal. The holding ponds primarily received the outflow from the sewage treatment plant; the evaporation ponds directly received the toxic industrial wastes from plutonium operations. When the ponds could no longer hold the full amount of these liquid wastes, Rockwell disposed of the wastes by a method called "spray irrigation."

Spray irrigation involves the transfer of wastes from the ponds to the grounds of Rocky Flats.

8. The use of spray irrigation to dispose of wastes from the evaporation ponds resulted in the disposal of highly toxic wastes directly on the ground. The use of spray irrigation to dispose of treated biological wastes, by contrast, would not ordinarily be a problem. At Rocky Flats, however, the use of spray irrigation from the holding ponds also was problematic because the wastes being spray irrigated were not solely biological wastes, but contained toxic materials. As stated earlier, the outflows from the sewage treatment plant contained toxic as well as biological wastes. Thus, Rockwell used spray irrigation to dispose of toxic wastes as well as biological wastes. (*See* Exhibit B, Attachment 1, Items 15 & 16)

9. Rockwell's improper use of spray irrigation also likely led to ground water contamination. Soil absorption and evaporation can only eliminate a certain quantity of liquid. If that quantity is exceeded, the liquid will enter and contaminate the ground water. The spray irrigated wastes also increased the ground water flow at Rocky Flats, specifically through former hazardous waste burial sites. This likely increased the rate of migration of these highly toxic wastes. (*See* Exhibit B, Attachment 1, Items 11, 15 & 16)

10. In addition, the method of spray irrigation employed by Rockwell at Rocky Flats caused the runoff of the wastes into the creeks that serviced the Great Western Reservoir and the towns surrounding Rocky Flats. Rockwell spray irrigated tremendous quantities of liquid on very limited areas regardless of temperature, precipitation or other climate factors. Because of this, the ground was unable to absorb all of the liquid and, thus, runoff of the wastes into the neighboring creeks likely occurred. This was evidenced by the erosion of the slopes at Rocky Flats which I personally observed. For example, spray irrigation of wastes onto eroded or frozen ground often causes

the wastes to run into the surface streams which flowed into lakes that supplied drinking water to residents of the towns surrounding Rocky Flats. (*See* Exhibit B, Attachment 1, Items 11 & 16)

11. I explained to Rockwell management that spray irrigation from the holding and evaporation ponds was resulting in toxic wastes being sprayed on the ground, which could contaminate the ground water and surface streams at Rocky Flats. I told management that I thought there was a better way to dispose of the waste products that Rockwell was then sprays irrigating. On December 1, 1980, I put some of my recommendations for an alternative irrigation method in writing. That document is attached as Exhibit C.

12. Rockwell management did not accept my recommendations and instead continued to spray irrigate and, in my view, contaminate the surface and ground water. I continued to voice my concerns about spray irrigation. It was my opinion that, sooner or later, the toxic wastes would find themselves in the ground water and the reservoirs downstream of Rocky Flats. I continued to be concerned with the ground water problems at Rocky Flats. Several years after my initial recommendation, on March 20, 1984, in connection with my suggestion that Rockwell retain me as a full-time engineering consultant, I stated that the ground water problems at Rocky Flats were "a latent time bomb." I attach a copy of that document as Exhibit D. My recommendations were not heeded; Rockwell continued to spray irrigate as before.

13. During the course of my work, I also learned about a third major problem which I thought affected the surface and ground water at Rocky Flats and the surrounding towns. As noted earlier, toxic industrial wastes were sent to evaporation ponds at Rocky Flats. Some of the liquid portion of these wastes either evaporated or was disposed of by spray irrigation. The remaining liquid and some solid wastes, or "sludge," remained in the ponds.

14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper manufacturing process for "pondcrete". Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (*See* Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks.

16. Rockwell also decided to use a waste mixing process similar to that proposed for pondcrete for forming "saltcrete." Saltcrete is a mixture of cement, salts and salt brine from liquid industrial waste treatment processes that is formed into large blocks. I knew from my general knowledge

of the process that, like the solid wastes being stored as ponderete, the saltcrete blocks also would have problems with deterioration. The saltcrete and other wastes were treated and stored at several sites at Rocky Flats in anticipation of being shipped off-site. (*See* Exhibit B, Attachment 1, Items 1 & 4; *see also id.*, Items 5, 6, 12, 13 & 14)

Plutonium

17. In or about 1982, I was asked to design a new exhaust "plenum" for a building at Rocky Flats which Rockwell intended to convert from a process building into an office building. A "plenum" is a duct or large chamber that collects air from the exhaust system before it leaves the building. A primary purpose of the plenum is to filter the air before it is released into the atmosphere. As part of my analysis of the proposed design for the exhaust system for this proposed new office building, I reviewed the designs and exhaust systems of other buildings at Rocky Flats.

18. While working on this project, I realized that some of the ductwork connected to the plenum was contaminated with radioactive wastes. I knew that the ductwork was over thirty years old, and deduced from that fact that numerous substances from different operations might have accumulated in the ducts. The presence of numerous toxins over the years, in my view, necessitated that the ducts be removed or cleaned. (Exhibit B, Attachment 2, Items 7, 8, 9, & 10)

19. I explained this problem to the project engineer. (Exhibit F) I also reviewed the records of the health and physics department, which confirmed my findings. (Exhibit G) I learned, however, that only the plenum, and not the ductwork, was to be cleaned. I recommended that Rockwell clean the ductwork as well. I suggested that Rockwell use new air filtration technologies, rather than replace the plenum, and use the saved money to clean the ductwork. (Exhibit H) My

suggestions were not followed. The building was designated a "clean" building and occupied for office and laboratory space, even with the contaminated ductwork.

20. I also discovered that in some buildings that were used for plutonium operations, "gloveboxes" used by employees working on plutonium and related safety features were not working properly. Plutonium is radioactive and one of the most highly toxic substances known to mankind. A "glovebox" is an enclosure into which workers place their hands to work on the processes using plutonium in the manufacture of nuclear bomb triggers. It is intended to prevent spontaneous combustion and unnecessary exposure to plutonium particles. The gloveboxes are connected through a filtered exhaust system to the ductwork which in turn is connected to the exhaust plenum. A properly functioning glovebox will, among other things, prevent over-pressurization and therefore prevent plutonium particles from entering the workplace. Gloveboxes are used at Rocky Flats because plutonium is extremely dangerous and radioactive. It is crucial to worker safety, and potentially to public safety, that the gloveboxes work properly and have adequate filters and other safety features.

21. I learned during my tenure at Rocky Flats that many of the gloveboxes being used by the workers were leaking. When this occurs, the plutonium particles enter the air and workers are unnecessarily exposed to the dangerous material. In addition, when the particles are airborne, additional plutonium may enter the exhaust ductwork that leads to the exhaust plenum. I also learned that the gloveboxes lacked necessary filters or the filters were punctured by workers trying to protect themselves because the filters were clogged from overuse and lack of maintenance. (*See* Exhibit B, Attachment 2, Items 1, 3, 5, 6, 8, 9 & 10)

22. In addition, the "dump" valves that were supposed to protect workers by maintaining the proper pressure in the gloveboxes were malfunctioning or not functioning at all.

"Dump" valves are safety devices that protect workers from exposure to plutonium particles in the event the gloveboxes malfunction. The dump valve is supposed to open when there is too much pressure in the gloveboxes. When the dump valves do not work, plutonium particles can leak into the workplace and create unnecessary hazards for workers. The malfunctioning of the dump valves also may lead to an accumulation of plutonium in the ductwork. (*See* Exhibit B, Attachment 2, Items 2, 8, 9 & 10) While at Rocky Flats, I recommended a way to prevent damage due to over-pressurization from the dump valves. (Exhibit I)

23. When I became aware of the failure of the dump valves to work properly, I reported that fact to my superior, Anthony Eden. At Mr. Eden's suggestion, we tested the dump valves. The test results confirmed that the valves were not working properly and had not been working properly for some time. (Exhibit J)

24. Perhaps most importantly, as part of my assigned projects at Rocky Flats, I concluded that the build-up of plutonium in the exhaust ducts created a danger to occupants of the building as well as to persons outside of the building. As stated earlier, I learned from my work in the various buildings that the gloveboxes, filters and dump valves were not working properly and that the equipment being used by workers was not cleaned or changed often enough. These discoveries, in my view, proved that the malfunctioning equipment and ineffective safety devices in the buildings at Rocky Flats created serious hazards. I realized that plutonium particles had likely accumulated throughout the ductwork of other Rocky Flat process buildings. (*See* Exhibit B, Items 1, 8, 9 & 10; *see also id.*, Item 4) Despite my findings, Rockwell did not, to my knowledge, undertake the necessary actions to abate these very significant hazards.

## Beryllium

25. Beryllium is a unique material used in the manufacture of nuclear triggers for nuclear bombs. It is an extremely toxic metal, although it is not itself radioactive. Workers who are exposed to dangerous levels of airborne beryllium can contract the deadly lung disease berylliosis.

26. During my tenure at Rocky Flats, I was assigned to a Rockwell project team to study the health and safety conditions in the beryllium machine shop and propose solutions. I was given this assignment after an employee contracted berylliosis. As part of this assigned project, I examined the environment of the beryllium machine shop and reviewed Rockwell's compliance there with health and safety requirements. Attached as Exhibit K is a document that I prepared outlining the criteria for the design of the air handling system of the beryllium machine shop.

27. As part of this work, I learned that the workplace environment of the machine shop was contaminated with hazardous levels of beryllium both in the air and on workplace surfaces. I also learned that the systems in the shop for distributing air and for monitoring the level of beryllium exposure were not installed or functioning properly and that, therefore, Rockwell's records did not accurately reflect the excessive levels of beryllium particles in the shop. In addition, excessive levels of beryllium particles were accumulating in the wrong places in the dust collection system servicing the beryllium shops. I suggested to management that the monitoring system be corrected and that a different method of machining be employed at the shop to prevent excessive beryllium particles from entering the air. Again, my suggestions were not heeded. (*See* Exhibit B, Attachment 3, Items 1-5)

Rockwell's Contract with the
United States

28. As a Rockwell employee, I was aware that Rockwell was operating Rocky Flats under a lucrative contract with the United States. I understood then that, under its contract with the United States, Rockwell could -- and did -- earn substantial "bonuses" every six months for its operations of the plant. Indeed, periodically during my employment at Rocky Flats, I received copies of documents describing the award fee determination process under which Rockwell could earn these bonuses. I attach as Exhibit L one of the documents that I received while employed at Rocky Flats which explains part of the process.

29. I also learned during my employment at Rocky Flats that, under its contract with the United States, Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. In addition, I learned that Rockwell's compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." In fact, page 2 of Exhibit L lists those performance areas that Rockwell had to satisfy in order to receive an award fee under the contract for the period in question. I understood, based on documents like Exhibit L, that Rockwell would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

I Voluntarily Provided Information
to the Government on Matters
at Issue in This Case

30. While employed at Rocky Flats, I was told by my superiors that I should not discuss the environmental, health and safety problems that I was discovering with

representatives of the Department of Energy or any other agency of the government. I followed these instructions.

31. Soon after the termination of my employment with Rockwell in March 1986, I approached the Federal Bureau of Investigation ("FBI") about some of the environmental, health and safety problems described above as well as a number of other problems at Rocky Flats. I was introduced to FBI Special Agent Jon S. Lipsky by an acquaintance of mine, named Bonnie Exnor. I first met with Mr. Lipsky at Ms. Exnor's office in the summer or fall of 1986. At that initial meeting, I described some of the matters outlined above in addition to other matters concerning Rocky Flats that are not at issue in this case. I subsequently met on at least three other occasions with Mr. Lipsky and representatives of the Environmental Protection Agency ("EPA"), and on one occasion with an Assistant United States Attorney. I also spoke by telephone on several other occasions with Mr. Lipsky. In addition, I provided the FBI with over 2,300 pages of documents. Further, I provided the FBI with the names of individuals with likely knowledge of Rockwell's environmental, health and safety compliance activities as well as recommendations as to where at Rocky Flats the FBI might best locate additional relevant documents and other evidence.

32. To my knowledge, the FBI recorded some of our discussions. I had other discussions with the FBI that, to my knowledge, were not recorded, including my initial meeting in Ms. Exnor's office and some of my telephone conversations with Mr. Lipsky.

33. The FBI reports that I have of my discussions with representatives of the government document some, but not all, of the matters that I reported to them. I attach as Exhibit M a report by FBI Special Agent Jon S. Lipsky summarizing aspects of my June 25, 1987 meeting with Mr. Lipsky and EPA Agent William F. Smith. As that report indicates, during the June 1987 meeting I voluntarily provided

information to the government concerning a number of matters on which this lawsuit is based, including matters involving ground water contamination, waste treatment and beryllium exposure.

34. I attach as Exhibit N an FBI report of my February 17, 1988 discussion with FBI Special Agent Lipsky, EPA Agent Smith and Assistant United States Attorney Ken Fimberg. Among other things, at that meeting I discussed my safety concerns about the Rocky Flats beryllium shop and the contaminated ducts. In addition, I attach as Exhibit O further documentation by the FBI recording certain of our telephone conversations and written communications concerning matters at issue in this lawsuit.

35. All of the information that I provided to the FBI and other government representatives was based upon my direct and independent knowledge, gained while I was an engineer at Rocky Flats working on matters that are now at issue in this lawsuit. I did not obtain the information outlined in this affidavit from news reports or reports of outside government investigations. Rather, I obtained the information outlined above by personal observation and in connection with my assigned projects at Rocky Flats to analyze these problems and propose solutions. The information I possess on the matters described in this affidavit is direct and independent of any public documents or news reports.

36. In August 1986, after the termination of my employment at Rockwell, I filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado. In that complaint, which I attach as Exhibit P, I included, among other things, some of the allegations concerning Rockwell's environmental violations involving wastewater, beryllium and plutonium (pp. 6, 9) that are presently at issue in this lawsuit (*see* Exhibit B).

37. Finally, simultaneously with the filing of this lawsuit, I submitted to the government a detailed Disclosure Statement. I attach as Exhibit Q a copy of my Confidential Disclosure Statement of Material Evidence and Information. As I state in that document (pp. 9-17, 19-20, 23-30), I voluntarily provided the government with information about which I had direct and independent knowledge on the surface and ground water, plutonium and beryllium allegations in this case. As the Disclosure Statement also states (pp. 24-30), I simultaneously provided the United States with four boxes of documents about matters at issue in this case about which I have direct and independent knowledge. I continued to supplement my Disclosure Statement by providing additional documentation to the government subsequent to its filing, and prior to the unsealing of this lawsuit.

38. In my Consolidated Answers to Discovery (Exhibit B), I summarized the factual bases of my claims in this action. Based on my work history at Rockwell, as described in part above, I have direct, independent and personal knowledge of the facts underlying each of the environmental, health and safety problems set forth in my Consolidated Answers. The material outlined in this affidavit, however, is not all-inclusive of the matters about which I have direct, independent and personal knowledge from my employment at Rocky Flats.

Conclusion

39. For the foregoing reasons, I respectfully request that Rockwell's motion to dismiss my complaint be denied.

/s/ James S. Stone
James S. Stone

Sworn to before me this
27th day of February, 1993.

/s/ Cynthia M. Annett

Notary Public

Notary Public
Cynthia M. Annett
State of Colorado

[Exhibit C to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, Excerpt]

**ENGINEERING CALCULATION SHEET** **REF 12-2-0**
**PROJECT NITRATE WASTE IRRIGATION** **PROJECT NO. 315332**
**BY JIM STONE**
**To: AL. KRIZNAR w/COPY TO BOB JENSON** **DATE 12-1-80**
**CALCULATION:** **SHEET 1 OF 3**

Comments On Design Criteria:

1. The Irrigation System Should Be Located In The Area North Of The 207 Ponds & The Psz For The Following Reasons:
   a) Less energy & cost due to shorter distance between source of wastewater & disposal area.
   b) The area should be cultivated in order to utilize the existing nitrogen trapped in the subsoil & to stabilize the slopes against erosion.
   c) The area is down-grade from the ponds & can be served by gravity with a siphon system.
   d) The area is down-wind from the Rocky Flats facility.
   e) The area is not suitable for other purposes, such as future expansion of the Rocky Flats facility.
2. The Irrigation System Should Be A Gravity Fed Dispersal Trench System For The Following Reasons:
   a) The geological formation & the soil texture is suitable for a shallow trench system to disperse the wastewater into the root zone uniformly.
   b) The system can be operated year-around & is more dependable than a mechanical sprinkler system.
   c) The system has less owning & operating costs.
   d) The system is more adaptable to the unique wind conditions at Rocky Flats.
   e) The system meets the criteria established by the environmental & safeguards/security divisions.
3. References:

a) Drawing – "Nitrate Waste Irrigation #Sk-315332-Dc-1"
b) "A Supplementary Report To An Engineering Study For Water Control & Recycle Concerning The Recovery Of Nitrate Laden Groundwater" By Engineering Science, Inc.
c) "Soil Investigation (Psz)" By CTL/Thompson, Inc.
d) "20" Wind Rose Rocky Flats" By AEC
e) "Freeze Index-Use Of Climatic Data In Design Of Soils Treatment Systems, Boulder, Co." By NO & AA.
f) "Design Manual – Land Treatment" By EPA 625/1-77-008
g) "Calculations – Area Req'd" By J. Stone (SHTS. 2 & 3).

[Exhibit E to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction]

**BEST AVAILABLE COPY**

Stone 10-3-82

## ENGINEERING ORDER

| TYPE OF ACTION | REVIEW | FINAL |
|---|---|---|
| ENGINEERING DRAWINGS | ☐ | ☐ |
| CONCEP. DES. REPORT | ☐ | ☐ |
| DESIGN CRITERIA | ☒ | ☐ |
| REQUEST FOR DIRECTIVE | ☐ | ☐ |
| OTHER ( ) | ☐ | ☐ |
| PROCUREMENT SPECS. | ☐ | ☐ |
| DESIGN DOC.-TITLE I/II | ☐ | ☐ |
| PROCUREMENT SPECS. AND/OR DWGS | INQ ☐ | PURCH. ☐ |
| CONSTRUCTION ISSUE | ORIG. ☐ | ADDENDUM ☐ |
| FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O. | ☐ | |
| OTHER ACTION SPECIFY | ☐ | |

TYPE OF FUNDING: LI ☐ GPP ☐ CEP ☐ WPAS ☐ EXP ☒

TYPE OF CONSTRUCTION: MAINT ☐ CPFF ☒ FIXED PRICE CONTACT ☐

QUALITY ASSURANCE LEVEL: I, IA, II, IIA, OR III (CIRCLE ONE OR MORE)

INSPECTION REQUIRED: SOURCE YES ☒ NO ☐; RECEIVING YES ☒ NO ☐; CONSTRUCTION YES ☒ NO ☐

REFER TO EO NO.

EO RELEASE DATE 10-4-82

INITIATOR: A.L. KRIZNAR 9/30/82 EXT 69-2722 DATE

PROJ. ENGR.: A.L. KRIZNAR EXT DATE

FUNCT. MGR.: A.J. Burge EXT. 2106 DATE 9-30-82

F.O.A.: A.L. Watson 9/29/82 EXT. DATE

E.O. COORDINATOR: [illegible] EXT. 2706 DATE 10-1-82 3:30 PM

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| USER J. DIROCCHI | 770 | 1 | 1 | 1 | |
| USER M. MAAS | 770 | 1 | 1 | 1 | |
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| FAC. ELEC. DES. MGR. | | 1 | 1 | 1 | |
| ESCS DES. MGR. | | | | | |
| POWER ENGR. | | 1 | 1 | 1 | |
| UTIL. & CIVIL DES. MGR. | | 1 | 1 | 1 | |
| CHEM. PROC. DES. MGR. | | 1 | 1 | 1 | |
| LOW ENG. | | 1 | 1 | 1 | |
| SOURCE INSPECTION | | | | | |
| RECEIVING INSPECTION | | | | | |
| ENERGY ENGR. | | 1 | 1 | 1 | |
| GEN. MGR. (TRANS. LTR. ONLY) | | | | | |
| WASTE MGT. MGR. | | 1 | 1 | 1 | |
| EOE | | | | | |
| SUPT. OPER. DIV. | | | | | |
| SEISMIC ANALYSIS | | | | | |
| INDUSTRIAL ENGR. | | 1 | 1 | 1 | |
| FILTER SYS. MGR. | | | | | |
| AREA SAFETY REP. | | | | | |
| TECHNICAL SECURITY | | | | | |
| EO COORDINATOR | | | | | |
| TOTAL NO. OF COPIES | | 30 | 30 | 35 | |

DESCRIPTION OF DOCUMENT(S)

| DRAWING NO. | ISSUE | TITLE |
|---|---|---|
| 27982-D01 | | P&ID |
| " -D02 | | P&ID |
| -D03 | | EQUIP LAYOUT |
| -D04 | | STRUCTURAL |
| -D05 | | MOTOR POWER PLAN |
| -D06 | | ONE LINE ELECT DIA. |

DESIGN CRITERIA REVIEW PACKAGE INCLUDING ABOVE DRAWINGS.

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of my objections & potential alternatives.
Jim Stone 10-13-82

[illegible]

☐ DISTRIBUTE PMR PER PMR DISTRIBUTION LIST

☐ REQUEST FOR ESTIMATE TO COST ENGRG. ONLY

PLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIZNAR BLDG. LAKE ARBOR BY THURSDAY OCT. 14 OR BRING YOUR COMMENTS TO THE REVIEW MEETING IN ROOM CONF. RM. BLDG. LAKE ARBOR TIME 1:00 PM DATE FRI. OCT. 15, 1982

REVIEWER'S SIGNATURE [signature] DATE 10-13-82

| CHARGE NO. | SUFFIX NO. |
|---|---|
| 530 | |
| E.O. NO. | BLDG. NO. |
| 7804 | FAC. 207 |

| PROJ. TITLE | PROJ. NO. | SUB. NO. | PAGE NO. |
|---|---|---|---|
| SOLAR EVAP. POND SLUDGE REMOVAL | 420906 | — | 1 OF 1 |

RF-40485 (11/81) DESTROY PREVIOUS ISSUES

[Exhibit L to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction]

Preliminary 3-month CPAF Rating
page 2

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we can take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. "For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. "We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award fee. The award fee is based on superior performance in the group of key Functional Performance Areas (FPAs) that DOE identifies for each 6-month CPAF evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (*see* attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

FUNCTIONAL PERFORMANCE AREAS
ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT *

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance *
Production Support *
Chemical Operations *
Technical Support
Quality Control *
Development Work
Nuclear Materials Management
Waste Management *
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security *
Nuclear Safeguards *
Facilities Engineering &
Construction Management
Facilities Maintenance, Utilities
and Energy Conservation Management *
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing *
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985.

[Exhibit Q to the Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, Excerpt]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1154

UNITED STATES OF AMERICA *ex rel.*,
JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION,
a corporation,

Defendant.

---

PLAINTIFF'S CONFIDENTIAL DISCLOSURE STATEMENT OF MATERIAL EVIDENCE AND INFORMATION

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Plaintiff James S. Stone herein submits to the United States Government, pursuant 31 U.S.C. §3730(2), his written disclosure of material evidence and information. Served concurrently herewith is a copy of Mr. Stone's Complaint Under False Claims Act, which document is being filed in camera and under seal with the United States District Court for the District of Colorado. This disclosure statement is confidential.

* * *

14. Analysis of pond crete method for drainage of solar evaporation ponds. Solar evaporation ponds have, for some time, been used to treat RCRA hazardous wastes. Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds. The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, he immediately recognized that the design could not work and would lead to serious problems. For example, the system was designed to remove sludge from the pond and mix that sludge with cement in order to create blocks of "pond crete" for disposal use. Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pond crete" blocks would rapidly disintegrate thus creating additional contamination problems.

Mr. Stone's advice, which involved alternatives, was rejected and the system was built as improperly designed. As shown by the FBI's search warrant application, at page 89, this system failed on at least one occasion during 1988 when Pond 207A was being drained for mixing, in Building 778, to form "pond crete" blocks. Mr. Stone's information also led to the FBI's broader investigation of Solar Evaporation Ponds and their misuse by Rockwell.

* * *

## VI. CONCLUSION

To the extent possible, the foregoing represents a statement of substantially all evidence and material information possessed by Mr. Stone. As noted in various portions of the document, some evidence is either classified, too technical, too voluminous, or otherwise not susceptible to inclusion at this time. However, Mr. Stone is ready and willing to revise and supplement his submittal of information in accordance with the Government's needs in pursuing and evaluating this matter. All communications regarding this matter should be directed through the undersigned or representatives of his law firm.

DATED: July 5th, 1989

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FILED
JUL 25 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY TO BRIEFS IN OPPOSITION

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## TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i
TABLE OF AUTHORITIES ..... ii
ARGUMENT ..... 1
CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,
532 U.S. 598 (2001) ..... 7, 10

*Buckley v. Valeo*,
424 U.S. 1 (1976) ..... 8

*Craig v. Boren*,
429 U.S. 190 (1976) ..... 7

*Comstock Resources, Inc. v. Kennard*,
125 S. Ct. 2957 (2005) ..... 1

*Cooper v. Blue Cross & Blue Shield of Florida, Inc.*,
19 F.3d 562 (11th Cir. 1994) ..... 4

*Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,
528 U.S. 167 (2000) ..... 9

*Marsh v. Chambers*,
463 U.S. 783 (1983) ..... 10

*Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*,
276 F.3d 1032 (8th Cir. 2002) ..... 6

*Morrison v. Olson*,
487 U.S. 654 (1988) ..... 9

*Riley v. St. Luke's Episcopal Hospital*,
252 F.3d 749 (5th Cir. 2001) ..... 8

*Saudi Arabia v. Nelson*,
507 U.S. 349 (1993) ..... 2

*In re Schimmels*,
127 F.3d 875 (9th Cir. 1997) ..... 8

*United States ex rel. Aflatooni v. Kitsap Physicians Services*,
163 F.3d 516 (9th Cir. 1998) ..... 5

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*,
190 F.3d 1156 (10th Cir. 1999) ..... 3

*United States ex rel. Joshi v. St. Luke's Hospital*,
441 F.3d 552 (8th Cir. 2006) ..... 8

*United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*,
186 F.3d 376 (3d Cir. 1999) ..... 3, 4

*United States ex rel. Springfield Terminal Ry. Co. v. Quinn*,
14 F.3d 645 (D.C. Cir. 1994) ..... 6

*United States v. San Jacinto Tin Co.*,
125 U.S. 273 (1888) ..... 8

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*,
529 U.S. 765 (2000) ..... 1, 2, 8

*Walz v. Tax Commission*,
397 U.S. 664 (1970) ..... 10

## FEDERAL STATUTE

31 U.S.C. § 3730(b)(1) ..... 8

31 U.S.C. § 3730(e)(4)(B) ..... 1, 4, 7

## OTHER AUTHORITY

Supreme Court Rule 10(c) ..... 10

13 Op. Off. Legal Counsel 207 (1989) ..... 1, 8, 9, 10

20 Op. Off. Legal Counsel 124 (1996) ..... 1

Brief for the United States, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828 (filed Oct. 22, 1999)) ..... 9

## ARGUMENT

The original source rule specifies both *what* the relator's knowledge must be ("the information on which the allegations are based") and *where* that knowledge must come from (it must be "direct" and "independent"). 31 U.S.C. § 3730(e)(4)(B). The Petition established that the circuits are divided on *what* knowledge the relator must have. The Tenth Circuit allows a relator to qualify if he knows background facts supporting his claim, Pet. App. 44a, 46a, while five other circuits require a relator to know enough facts to establish at least one element of an FCA claim. The briefs in opposition respond by arguing that the question of *where* that knowledge must come from is a factual one on which the circuits are in harmony. That proposition, even if true, is simply irrelevant.[1] As long as a relator can play games with *what* knowledge the statute requires him to possess, the words "direct" and "independent" cannot limit the *qui tam* statute, since all relators will have "direct" and "independent" knowledge of something. Review is warranted to resolve this conflict and to restore the limiting force of the original source rule.

Review is also warranted to address what Assistant Attorney General William P. Barr characterized as "the most important separation of powers question" his office had to address. 13 Op. Off. Legal Counsel 207, 207 (1989) (Barr, W.) ("Barr Op."), *superseded by* 20 Op. Off. Legal Counsel 124 (1996) (Dellinger, W.) The *qui tam* statute poses "a devastating threat to the Executive's constitutional authority" because it "allows Congress to circumvent the Executive's check and to have its laws enforced directly by its own private bounty hunters." *Id.* at 208 & 211. This question was reserved by this Court in *Vermont Agency of*

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[1] For the same reason, *Comstock Res., Inc. v. Kennard*, 125 S. Ct. 2957 (2005), is immaterial. The relator in *Comstock* actually knew about the fraud itself—he held oil leases upon which Comstock was making inadequate payments. Thus, the issue in *Comstock* was not *what* the relator knew, but rather *where* the relator got his information.

*Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and the time has come to resolve it.

1. The "basis" of an action is not background information supporting the action, but rather "those elements of a claim that, if proven, would entitle a plaintiff to relief." *Saudi Arabia v. Nelson*, 507 U.S. 349, 356–57 (1993). Stone denies that the Tenth Circuit's standard allows a relator to get by with mere background knowledge. Stone Opp. at 16 n. 12; *but see* Pet. App. 44a, 46a (Briscoe, J. dissenting). But the "standard" he claims the court applied, Stone Opp. at 15, speaks only to the meaning of "direct" and "independent," not to the meaning of "information on which the allegations are based." In the Third, Eleventh, and Ninth Circuits, the relevant "information" is facts sufficient to establish the element of misrepresentation. In the D.C. and Eighth Circuits, the relevant "information" is facts sufficient to establish the true state of affairs. But in the Tenth Circuit, the relevant "information" is anything that supports the *qui tam* claim. Pet. App. 20–21a. Although Respondents insist this case is factbound and unworthy of review, Stone Opp. at 1, 13–14, they do not deny that the Tenth Circuit did not find that Stone knew the facts he would have needed to know to prevail in other circuits. This is not a case about disputed facts. It is a case about the application of a disputed legal standard to conceded facts.

The Tenth Circuit never found that Stone had direct and independent knowledge of the actual misstatements to the Government. Neither Respondent argues to the contrary. Instead the Tenth Circuit held, *as a matter of law*, that a "relator need not ... have in his possession knowledge of the *actual* fraudulent conduct itself." Pet. App. 21a.

Nor would the record have supported any such finding. Stone says he "knew that Rockwell was being paid under its contract based on false claims," Stone Opp. at 3, but he never claims to have seen the false claims or even to have been told about them. Instead, he says he could *infer* the false claims from (a) the fact that Rockwell was paid in part based on environmental performance, (b) the fact that

Rockwell continued to be paid despite environmental problems, and (c) a 1981 conversation in which Stone was instructed not to unilaterally discuss environmental issues with DOE—the so-called "gag order." *See* Stone Opp. at 3–4; U.S. Opp. at 10–11. Of course, any inferences Stone drew about concealment of *general* ES&H problems are irrelevant—only knowledge of *pondcrete* misrepresentations counts. *See* Pet. App. 50–51a. The mere fact that a company seeks to channel its external communications through specific, authorized employees hardly supports an inference of fraud. And the "gag order" conversation occurred years before Rockwell began making pondcrete. But in any event, Stone's inference would not have sufficed had this case been brought in the Third, Eleventh, or Ninth Circuits, and at a minimum, the Tenth Circuit did not make findings sufficient to permit Stone to win in any of those courts.[2]

a. In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999) (Alito, J.), the court held that a relator must know of the actual misrepresentation itself in order to qualify as an original source. That holding irreconcilably conflicts with the Tenth Circuit's contrary ruling. Pet. App. 21a. Moreover, the relator in *Mistick* was an insider able to draw the same inference Stone claims to have drawn. *But see* U.S. Opp. at 12–13. Both relators knew that the Government was paying for certain levels of performance—competent lead paint encapsulation or compliance with ES&H standards. Both relators had reason to believe those performance levels were not being met.[3] And both relators

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[2] The fact that Rockwell argued an intra-circuit split when petitioning for en banc review (*see* Stone Opp. at 11, 18–19) is immaterial. Rockwell attempted to harmonize *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.* 190 F.3d 1156 (10th Cir. 1999) with the rule of various other circuits. But the Tenth Circuit *rejected* Rockwell's construction, and rehearing *en banc* was denied. *See* Pet. App. 15–22a. *Stone* now represents the definitive statement of Tenth Circuit law.

[3] Stone dismisses Mistick's meeting with Glidden because it occurred after Glid-Wall was improperly used for lead paint encapsulation. Stone

had some additional reason to suspect that misrepresentations might have occurred: Stone knew about the gag order, while Mistick knew that when HUD found out about Glid-Wall's defects, it ordered that work be delayed and that the "lead-abatement specifications" be changed. 186 F.3d at 381. Mistick's ability to infer false statements did not satisfy the Third Circuit's interpretation of Section 3730(e)(4)(B). Stone's far less compelling inference would not have either.[4]

b. Stone's inference also would not have satisfied the standard articulated by the Eleventh Circuit in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 564 (11th Cir. 1994). In *Cooper*, the relator had documentary proof that his insurance company was submitting claims to Medicare for primary payment when it should have been paying them itself. *Id.* Specifically, the relator had letters from Blue Cross *referring his own claims* to Medicare. *Id.* The Eleventh Circuit only found Cooper to be an original source because his "information [was] potentially *specific, direct evidence of fraudulent activity*." *Id.* at 568 & n.12 (emphasis added). Stone's assertion that his knowledge "is even stronger than the relator's was in *Cooper*," Stone Opp. at 20, is flatly wrong. Stone not only lacked physical copies of the false statements (which Cooper had, 19 F.3d at 564),

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Opp. at 23 n.17. This is a distinction without a difference. The only timing requirement imposed by the FCA is that a relator acquire direct and independent knowledge before *the public disclosure*, not before the wrongful conduct that a defendant later conceals from the Government.

[4] The FOIA issue in *Mistick* is a red herring. Stone Opp. at 23–24, U.S. Opp. at 12–13. If the inference Mistick was able to draw had been sufficient to satisfy the original source rule, the mere act of confirming that inference through FOIA could not have changed the result. Mistick's recourse to FOIA was only relevant because the knowledge it had before filing the FOIA request—knowledge that tracks Stone's—was not sufficient. *See* 186 F.3d at 402 (Becker, C.J., dissenting) ("[E]ven if the FOIA material were to constitute a public disclosure, Mistick's qui tam action may not be 'based upon' public disclosures because it claims that it learned the true state of facts ... earlier, through meetings with the maker of Glid Wall.").

he in fact had no idea whether Rockwell ever made a false statement to the United States. Pet. App. 46–47a (Briscoe, J. dissenting). At best, he guessed that they might have—and a guess is not "specific, direct evidence."

c. Finally, Stone's inference is exactly the sort of speculation forbidden by the Ninth Circuit in *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525–26 (9th Cir. 1998). Dr. Aflatooni interviewed specific patients and reviewed their medical records. 163 F.3d at 525. He knew of a general pattern of misbehavior—provision of medically unnecessary procedures—and he knew how defendants got paid because he was an insider at the fiscal intermediary involved in the fraud. *Id.* Similarly, Stone knew of a general pattern of misbehavior—EH&S violations—and he knew how Rockwell got paid because he worked at Rocky Flats. Dr. Aflatooni sought to *infer* false statements to Medicare, but his inference failed because he had no specific knowledge that unnecessary services were actually billed to Medicare. *Id.* at 525–26. Stone's knowledge suffers an analogous gap—just as Dr. Aflatooni did not know that any of the unnecessary work was billed to Medicare, Stone did not know that any of the pondcrete problems were concealed from DOE.[5] *See* Pet. App. 47a (Briscoe, J. dissenting) (characterizing Stone's inference as the speculation forbidden by *Aflatooni*).

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[5] Stone's blithe assertion that he would satisfy the narrow exception for triggering relators, *see* Stone Opp. at 23 n.16, is unsupported by the record. U.S. attorneys at the time denied that Stone triggered the investigation. *See* Petition at 10–11. And when it declined to intervene, the United States reviewed "substantially all" of the "material evidence and information" possessed by Stone and found *no indication* that Rockwell had made false statements. *See* Petition at 3. Stone misleads this Court by stating that the United States intervened "[b]ased in part on submissions by Mr. Stone." Stone Opp. at 2. The "submissions" to which the Government referred consisted of "voluminous documents that had been produced *during the course of document discovery*" and that "strengthened the relator's case." C.A. App. 905 (emphasis added). The issue here is whether Stone knew enough *before* discovery. At the time, the United States thought he did not.

2. Independently, the Tenth Circuit never found that Stone had direct and independent knowledge of the real ponderete problem at Rocky Flats. Instead, the Tenth Circuit held, *as a matter of law*, that it was "immaterial" that Stone's predictions about the pondcrete system were wrong. Pet. App. 22a. Respondents do not contest that pondcrete failed to solidify at Rocky Flats because a single foreman reduced the quantity of cement used, nor do they deny that Stone did not know about the foreman's actions because the change in formula occurred after Stone left Rocky Flats. *See* Petition at 7–8. Respondents never deny that the problem Stone predicted in his Engineering Report—a breakdown in the piping system—never occurred *and was never argued to the jury*. *See id.*

This suffices to establish a conflict with the Eighth and D.C. Circuits. While those courts do not require a relator to know about the misrepresentation itself, they balance that by requiring the relator to have "direct knowledge of the *true* state of the facts." *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (emphasis added); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994). Stone concedes that he can only satisfy this standard for those "ES&H problems" that he actually "*observ[ed]*." Stone Opp. at 20 (emphasis added). But Stone did not observe the actual pondcrete problem, because the pondcrete formula was not changed until after he left Rocky Flats. He predicted a pondcrete problem, but even his prediction turned out to be wrong. The relators in *Nurse Anesthetists* and *Springfield* were insiders *at the time the improper conduct occurred*, which put them in a position to actually see the true state of the facts. Stone was not. *See* Petition at 7–8; Pet. App. 46a (Briscoe, J. dissenting).

3. This Court need not abstain from resolving this circuit split merely because Rockwell will still owe damages to the United States. Stone Opp. at 25–27. If Stone is not a prevailing party, his pending motion before the district court for almost $10 million in fees and costs will fail, *see*

Pet. App. 9–10a, and the Tenth Circuit's order awarding fees on appeal will be reversed. *See* Supp. Pet. App. at 1–2a. Disputes over attorneys fees regularly justify certiorari. *See, e.g., Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001). Both courts below allowed Rockwell to litigate Stone's original source status. *Cf. Craig v. Boren*, 429 U.S. 190, 193–94 (1976). Indeed, Rockwell is unaware of any court that has ever held that a *qui tam* defendant may not contest a relator's original source status.[6]

4. Rockwell never conceded that Stone qualifies as an original source. In the brief Stone cites, *see* Stone Opp. at 6–7, Rockwell was responding to a hypothetical involving a factory worker who knew that his employer was manufacturing gold-plated widgets and fobbing them off on the government as solid gold. CA App. 577. The language Stone quotes is preceded and followed by the argument that "Stone had no direct and independent knowledge that Rockwell ... concealed those problems from the government"—exactly the argument made in the Petition.[7]

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[6] The claim that Stone performed a valuable public service, Stone Opp. at 26 n.19, begs the question. If Stone is not an original source, then the Congress did not intend to compensate him.

[7] The full text of the paragraph Stone quotes reads as follows:

> *Stone's position in this case is not even remotely analogous to that of the widget factory worker. Stone lacked any knowledge whatever of fraudulent conduct by Rockwell, much less the direct and independent knowledge possessed by the factory worker and required by section 3730(e)(4)(B).* At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination; that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment; that plutonium "gloveboxes" were leaking and lacked necessary filters; and that the beryllium machine shop was contaminated with hazardous levels of beryllium. *By his own admission, however, Stone had no direct and independent knowledge that Rockwell either concealed those problems from the government or falsely told the government that the problems did not exist.*

CA App. 578 (citations omitted) (italicized text was omitted by Stone).

And the same brief analyzed the Engineering Order, and argued that the problem it identified—"removal of sludge from the solar evaporation pond"—had nothing to do with "either pondcrete or saltcrete." CA App. at 608.

5. As to the Appointments Clause, Respondents rely on the same circular argument the Tenth Circuit employed. U.S. Opp. at 19–20, Stone Opp. at 28. The Petition does not argue that Stone is literally an "officer" of the United States. Rather, the Petition argues that the FCA gave Stone powers—namely the power to bring and to pursue a civil action "for the United States Government," 31 U.S.C. § 3730(b)(1)—that the Appointments Clause reserves for officers. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888).

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that the *qui tam* statute effected a partial assignment of the Government's damages claim to relators. That does not save the *qui tam* statute. *But see* U.S. Opp. at 18, 20. What *Stevens* established is that a *qui tam* relator, having received only a partial assignment, is still litigating *the Government's claim* as well as his own. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758, 770, 772 (5th Cir. 2001) (en banc) (Smith, J. dissenting). But under the Appointments Clause, exclusive responsibility for litigating the Government's claims rests with the Executive.

The Government's effort to equate the *qui tam* statute with other laws that grant private citizens the right to sue, U.S. Opp. at 20, 21, fails because, in the *qui tam* context, the United States remains the real party in interest. *See, e.g.*, *United States ex rel. Joshi v. St. Luke's Hosp.*, 441 F.3d 552, 560 (8th Cir. 2006). And as a result, a *qui tam* lawsuit has collateral consequences that are unheard of in other private litigation contexts. For example, a judgment or settlement obtained by a *qui tam* relator can act as *res judicata* against the Government. *See In re Schimmels*, 127 F.3d 875 (9th Cir. 1997); Barr Op. at 219–20 (discussing collateral

consequences of FCA *qui tam* relator action).[8] The ability to foreclose the United States from later litigation belongs exclusively to the Executive.

6. As to the Take Care Clause, the ability to intervene (U.S. Opp. at 18–19; Stone Opp. at 28–29 n.22) is a "meager substitute for the power to decide whether prosecution will occur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 209 n.2 (2000) (Scalia, J. dissenting). The Government flatly concedes that "[n]either the relator nor his attorney in conducting *qui tam* litigation has any duty to subordinate the relator's interest to that of the government should a conflict between those interests arise." U.S. Opp. at 19–20. And Stone proves the point by continuing to litigate, on behalf of the United States, a claim which the Chief Executive *has rejected*. Pet. App. 8-9a. The ability to intervene is simply inadequate to "ensure that the President is able to perform his constitutionally assigned duties." *Morrison v. Olson*, 487 U.S. 654, 696 (1988).

The Government's claim that the Executive retains "substantial authority to resist uses of the *qui tam* mechanism," U.S. Opp. at 22, fails because that control rests in the hands of an Article III judge, not the Article II Executive. "[A]ll disputes between [the Executive] and the relator over the conduct of the case—from discovery to witness selection to cross-examination—are decided by the Court." Barr Op. at 218. This wholesale transfer of executive power to the federal court judge overseeing the *qui tam* action violates the separation of powers and fails even the most lenient standards this Court has adopted. *See Morrison*, 487 U.S. at 696. And unless this Court enforces the Appointments and Take Care Clauses, nothing will stop the Congress from privatizing all civil law enforcement, by

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[8] Before this Court in *Stevens*, the United States acknowledged that "[t]he judgment in a *qui tam* suit has traditionally been given preclusive effect in a subsequent action brought by the government," and observed that Congress maintained that rule with the 1986 amendments. Brief for the United States at 41 n.26, *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828) (filed Oct. 22, 1999).

assigning the Government's claims in connection with other statutes. *See* Barr Op. at 208.[9]

7. Finally, history does not save the *qui tam* statute. The statutes of the first Congress, cited by the Government, U.S. Opp. at 17, were passed when the Executive was in its infancy. *See* Brief of Amicus Curiae Chamber of Commerce of the United States of America, at 13–14. The most significant feature of those statutes is that none of them permitted the Government to intervene once a relator brought suit. *See* Barr Op. at 21. As Respondents and the Tenth Circuit rest on the Government's ability to intervene in *qui tam* cases, they can hardly place excessive stock in the early statutes. Moreover, only three of the seventeen so-called "informer statutes" permitted a citizen who had not suffered a personal injury to sue on behalf of the Government. In any event, "historical patterns," standing alone, "cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Especially where the issue is Congress undermining another branch's power, the self-serving enactments of an early Congress cannot somehow empower a later Congress to brush aside the separation of powers. *See* Barr Op. at 233 (citing examples of "actions taken by the first Congress that later became viewed as unconstitutional").

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[9] Admittedly, no court of appeals has yet held the *qui tam* statute unconstitutional. That has never stopped this Court before. *See, e.g.*, *Buckhannon*, 532 U.S. at 621 ("Indeed, our opinions sometimes contradict the *unanimous* and long-standing interpretation of lower federal courts."). And the courts below have certainly found this issue difficult—it took the en banc Fifth Circuit to reverse a panel decision striking down the *qui tam* statute. As the Barr and Dellinger opinions demonstrate, even the Assistant Attorneys' General for the Office of Legal Counsel have reached different conclusions on the issue. In any event, this case presents a important question that goes to the heart of separation of powers principles and conflicts with this Court's decisions in *Buckley*, *Edmond*, and *Morrison*. *See* Supreme Court Rule 10(c).

Respectfully submitted,

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# SUPPLEMENTAL APPENDIX

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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Nos. 99-1351, 99-1352, & 99-1353

UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, and UNITED STATES OF AMERICA,

Plaintiff-Appellees and Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants and Cross-Appellees.

April 5, 2006

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**ORDER GRANTING MOTION FOR AWARD OF ATTORNEY'S FEES**

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Before **BRISCOE, HOLLOWAY** and **HARTZ**, Circuit Judges

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In these related appeals, all merits issues have been determined. There remains pending the motion of plaintiff Stone for an award of attorneys' fees. As prevailing party in the main appeal by Rockwell, Stone is statutorily entitled to

a fee award. We have previously noted that the fee provision in 31 U.S.C. § 3730(d)(1), which provides for recovery of fees by a successful *qui tam* relator, is phrased in mandatory language. *Shaw v. AAA Eng. & Drafting, Inc.*, 213 F.3d 538, 544 (10th Cir. 2000).

We therefore grant the motion and remand to the district court for a determination of a reasonable fee award. *See Hoyt v. Robson Cos.*, 11 F.3d 983, 985 (10th Cir. 1993).

Entered for the Court

By: /s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker
Clerk of Court

BRISCOE, J., dissenting:

I respectfully dissent. As I did not join the majority in its resolution of these cases on their merits, I likewise would not grant plaintiff Stone's motion for fees as a prevailing party

Supreme Court, U.S.
FILED
JUL 14 2006
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No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA EX REL. JAMES S. STONE,

*Respondents.*

**On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit**

## BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

## TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS UNDER ARTICLE II REMAINS AN OPEN QUESTION ..... 4

II. THE *QUI TAM* PROVISIONS PRESENT SUBSTANTIAL ARTICLE II ISSUES WORTHY OF THIS COURT'S REVIEW ..... 13

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### CASES

**Page**

*Aufmordt v. Hedden*, 137 U.S. 310 (1890) ..... 16

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 14, 15, 16, 17

*Clinton v. City of New York*, 524 U.S. 417 (1998) ..... 11

*Edmund v. United States*, 520 U.S. 651 (1997) ..... 14, 15

*Freytag v. Comm'r of IRS*, 501 U.S. 868 (1991) ..... 15

*GPM Gas Corp. v. Grynberg*, 277 F.3d 1373 (5th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) ..... 12

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 18, 19

*Mistretta v. United States*, 488 U.S. 361 (1989) ..... 3, 4

*Morrison v. Olson*, 487 U.S. 654 (1988) ..... 4, 15, 17, 20

*Printz v. United States*, 521 U.S. 898 (1997) ..... 3

*Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 1999) ..... 6

*Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc) ..... *passim*

*Ryder v. United States*, 515 U.S. 177 (1995) ..... 14

*United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) ..... 7, 8, 12-

*United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) ..... 19

*United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) ..... 7, 8

*United States v. Germaine*, 99 U.S. 508 (1879) ..... 16

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... *passim*

**STATUTES AND REGULATIONS**

False Claims Act, 31 U.S.C. § 3730

31 U.S.C. § 3730(b) ..... 3, 4
31 U.S.C. § 3730(b)(1) ..... 15, 18
31 U.S.C. § 3730(b)(4)(B) ..... 18
31 U.S.C. § 3730(c)(1) ..... 16
31 U.S.C. § 3730(c)(2) ..... 16
31 U.S.C. § 3730(c)(2)(A) ..... 18
31 U.S.C. § 3730(c)(2)(B) ..... 18
31 U.S.C. § 3730(c)(3) ..... 16, 18
31 U.S.C. § 3730(e)(4) ..... 1

**MISCELLANEOUS**

Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 Wis. L. Rev. 381 (2001) ..... 8

James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993) ..... 9

John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.12 (3d ed. 2006) ..... 9

Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989) ..... 9

Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 Geo. Wash. L. Rev. 609 (1994) ..... 9

William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201 (1998) ..... 12, 19, 20

Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 Stan. L. Rev. 853 (1997) ..... 9

Memorandum Opinion For The Attorney General, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel 207 (1989), 1989 WL 595854 ..... *passim*

Memorandum Opinion For The General Counsels Of The Federal Government, *The Constitutional Separation of Powers Between the President and Congress*, 20 U.S. Op. Off. Legal Counsel 124 (1996), 1996 WL 876050 ..... 10

Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992) ..... 19

U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* (2006)..... 11, 12

## INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of business organizations.[1] It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business.

This is such a case because the *qui tam* provisions of the 1986 False Claims Act ("FCA") threaten every federal government contractor, health care provider, and grant recipient in the United States. The Court should review this appeal for two reasons:

*First*, the circuits are split on how to interpret the "original source" jurisdictional requirement for *qui tam* suits, 31 U.S.C. § 3730(e)(4). The original source rule affords an important protection against the filing of unmeritorious or vexatious *qui tam* suits by relators who do not genuinely possess otherwise unknown factual information directly relating to submission of false claims against the Government.

*Second*, and even more fundamentally, the Court should grant review to resolve, at last, the constitutional

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[1] Pursuant to Sup. Ct. R. 37.6, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Sup. Ct. R. 37.2, written consent to the filing of this brief has been obtained from counsel for Petitioners and Respondents, and the documents reflecting consent have been filed with the Clerk's office.

question that the Court explicitly reserved in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000): Whether the *qui tam* provisions, which vest self-appointed private relators with sweeping powers to initiate and conduct civil false claims litigation on behalf of the United States, violate the Appointments and Take Care Clauses of Article II of the Constitution. Because this is a threshold question underlying the entire *qui tam* scheme, the Chamber's *amicus* brief focuses on that issue and the reasons why the Court should grant certiorari to address it.

The *qui tam* provisions present a separation of powers question that directly implicates congressional encroachment of Executive Branch constitutional duties. It is a clearly defined, long debated, and fully mature issue which has been smoldering just below the surface of the more than 5,000 *qui tam* actions that have been filed since the current provisions were enacted two decades ago. During this period many Chamber members, especially those involved in defense procurement and the nation's health care system, have been subjected to a continuing barrage of *qui tam* suits brought by officious bounty hunters. In the vast majority of cases, the Department of Justice, following investigation, has declined to support the relators' fraud claims, which *qui tam* defendants nevertheless are forced to litigate or settle at substantial cost.

The Chamber has consistently contended, including in *amicus* briefs filed with this Court in *Stevens* and the Fifth Circuit in *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001), that the 1986 *qui tam* provisions are a blatant example of unconstitutional congressional interference with performance of Executive Branch responsibilities. The instant *qui tam* appeal, where the Department of Justice clearly exercised its prosecutorial discretion, initially declining to intervene and subsequently deciding to support only some of the relator's claims, presents an ideal vehicle

for resolving the Article II issue. Accordingly, the Chamber is submitting this brief to urge the Court to grant review.

## SUMMARY OF ARGUMENT

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The FCA's *qui tam* provisions, 31 U.S.C. § 3730(b), represent a serious breach of the separation of powers. "The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the 'Courts of Law' or by 'the Heads of Departments' who are themselves Presidential appointees), Art. II, § 2." *Printz v. United States*, 521 U.S. 898, 922 (1997). By enacting the *qui tam* provisions, however, Congress has invaded Article II territory. It has impermissibly (i) seized, reassigned, and diffused the Executive Branch's Appointments power by allowing private relators essentially to appoint themselves as "Officers of the United States," and (ii) empowered such financially motivated *qui tam* relators (including disgruntled former employees proceeding in their own self interest) to obstruct or impair the Executive Branch's ability to "take Care" by vesting them with significant authority to prosecute, at their sole discretion, alleged false claims for, and in the name of, the United States, against any government contractors, health care providers, or grant recipients that they choose to target.

This Court has "not hesitated to strike down provisions of law . . . that undermine the authority and independence of one or another coordinate Branch,"

*Mistretta*, 488 U.S. at 382, especially where a federal statute "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *id.* at 383 (internal quotation marks omitted). That is the case here. The *qui tam* provisions flout the Appointments Clause and undermine the Executive Branch prosecutorial discretion embodied in the Take Care Clause. The constitutionality of the *qui tam* provisions under Article II remains an important and unresolved question worthy of this Court's review, even under the lenient "sufficient control" criterion set forth in *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the now-expired independent counsel provisions of the Ethics in Government Act of 1978). Indeed, in 2000 the Court raised the *qui tam* Article II issue in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S at 778 n.8, but expressed no view on it, other than to rebuke the dissent's unsupported assertion that historical evidence of various types of *qui tam* actions in England and America somehow establishes that the substantially different 1986 FCA *qui tam* provisions can be reconciled with the Appointments and Take Care Clauses.

## ARGUMENT

### I. THE CONSTITUTIONALITY OF THE QUI TAM PROVISIONS UNDER ARTICLE II REMAINS AN OPEN QUESTION

This Court should resolve, once and for all, the enduring but fundamental question of whether the FCA's *qui tam* provisions, 31 U.S.C. § 3730(b), violate Article II of the Constitution, specifically the Appointments and Take Care Clauses. Six years ago, in *Stevens*, the Court explicitly reserved the Article II issue for consideration in an appropriate case. The *qui tam* provisions, and the voracious litigation industry that they have engendered, continue to present a real-world separation of powers issue that calls into

question Congress' ability to undermine Article II Executive Branch responsibilities however it deems expedient. As long as this Court allows to remain unchecked the FCA's brazen reassignment and diffusion of Executive Branch prosecutorial discretion to private, self-appointed, unsupervised, financially motivated *qui tam* relators, an emboldened Congress will continue to act as if Article I enables it to abrogate or alter the Executive Branch's clearly delineated Article II powers, duties, and prerogatives.

In *Stevens* the Court held, based in part on "the long tradition of *qui tam* actions in England and the American Colonies . . . history [that] is particularly relevant to the constitutional standing inquiry," 529 U.S. at 774, that *qui tam* relators have Article III standing under the FCA. Writing for the majority, however, Justice Scalia not only acknowledged the separate Article II question, but also specifically saved it for another day. *Id.* at 778 n.8 ("In so concluding, we express no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."). He noted that in *Stevens*, in which the *qui tam* relator alleged submission of false claims by a state agency to a federal agency (a type of *qui tam* suit which the Court held cannot be maintained under the statute), "Petitioner does not challenge the *qui tam* mechanism under either of those [Article II] provisions, nor is the validity of *qui tam* suits under those provisions a jurisdictional issue that we must resolve here." *Ibid.*

To make it very clear that the Article II question remained open, the *Stevens* Court, *ibid.*, chided the dissent for "proceed[ing] to volunteer an answer," *see id.* at 801 (Stevens, J., dissenting) (asserting that "[t]he historical evidence summarized by the Court . . . together with the evidence that private prosecutions were commonplace in the 19th century . . . is also sufficient to resolve the Article II question"). *See Riley v. St. Luke's Episcopal Hosp.*, 252

F.3d 749, 770 (5th Cir. 2001) (en banc) (Smith, J., dissenting) (the "majority in *Stevens* expressly disclaimed any view with regard to Article II challenges . . . the fact that the majority in *Stevens* took pains to point out that it was not deciding the constitutionality of *qui tam* suits under Article II suggests strongly that the Court did not think this issue is easily decided by history."); Pet. App. 24a ("The *Stevens* Court . . . was careful to specify that it was expressing no opinion concerning other constitutional challenges to *qui tam* actions, namely whether they violate the Take Care and Appointments Clauses of Article II.").

Neither of the post-*Stevens* court of appeals opinions that address the Article II issue illuminate the subject in a way that mitigates the continuing need for this Court to decide the question. In *Riley*, a *qui tam* action against health care providers, a divided Fifth Circuit panel originally held that the *qui tam* provisions do violate the Take Care Clause and the separation of powers doctrine. *See* 196 F.3d 514, 530 (5th Cir. 1999).[2] But on rehearing, a divided en banc court of appeals, despite the *Stevens* majority's admonition, repeatedly relied upon the conclusory dictum in the *Stevens* dissent in holding that the *qui tam* provisions do not violate Article II. *See Riley*, 252 F.3d at 752-53. ("[T]he dissent in *Stevens* noted that history alone resolves the question of whether the qui tam provisions in the FCA violate Article II."); *id.* at 758 n.13 ("The dissent in *Stevens* plainly stated that the FCA's qui tam provisions do not violate the Appointments Clause.").

In holding that the *qui tam* provisions do not represent an "unconstitutional intrusion" of "the constitutional separation of powers doctrine under the Take Care and Appointments Clauses of Article II," *id.* at 751, the

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[2] The panel did not reach the Appointments Clause question. *See Riley*, 196 F.3d at 531.

en banc majority in *Riley* asserted "it is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute." *Id.* at 752. Judge Smith (joined by Judge DeMoss) wrote a comprehensive dissent to the en banc opinion. He explained that "[t]he Article II issues raised by the FCA, however, were not so easily disposed of by history, and thus the majority did not address them in *Stevens*." *Id.* at 772. "[T]he nature of the standing inquiry dictates that special attention be paid to historical practice. Such extreme deference need not be given, by contrast, within the context of Article II challenges." *Ibid.*[3]

The other post-*Stevens* court of appeals decision on Article II is the Tenth Circuit's opinion below. The court relied upon *Riley*, and also the two pre-*Stevens* court of appeals decisions which found no Article II violation. *See* Pet. App. 26a, 28-29a (discussing *Riley*; *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993)). But this Court's doctrinal-based rationale in *Stevens* for holding that *qui tam* relators have Article III standing—that "[t]he FCA can reasonably be regarded as effecting a *partial* assignment of the Government's damages claims," 529 U.S. at 773 (emphasis added)—casts substantial doubt upon the Article II analyses in *Taxpayers Against Fraud* and *Kelly*. Those

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[3] Judge Smith observed, based on a Supreme Court case "which was decided just four months before *Stevens*," that "Justice Scalia, the author of the majority opinion in *Stevens*, and Justice Thomas and perhaps Justice Kennedy, seem to have reservations as to the constitutionality of *qui tam* actions under Article II." *Riley*, 252 F.3d at 770 (Smith, J., dissenting).

analyses are predicated upon the notion, subsequently rejected in *Stevens*, that the *qui tam* provisions do not vest relators with governmental power. *See Taxpayers Against Fraud*, 41 F.3d at 1041 ("Although a relator may sue in the government's name, the relator is not vested with governmental power."); *Kelly*, 9 F.3d at 758 ("The fact that relators sue in the name of the government does not vest them with any governmental powers. . . ."). Judge Smith's dissenting opinion in *Riley* elaborates upon this conflict with *Stevens*:

> [T]here can be no mistake that, in the wake of *Stevens*, a relator is litigating on behalf of the government, because *Stevens* explicitly states that a relator is only a *partial* assignee, and accordingly, the part of the claim the relator is not litigating for himself he is litigating for the government. . . . [E]ven though the government signs over to the relator sufficient partial interest in the litigation to qualify for Article III standing, the majority interest that is not signed over--and therefore still owned by the government--must be prosecuted by an officer of the United States under the Appointments Clause, and must be faithfully managed by the Executive under the Take Care Clause.

*Riley*, 252 F.3d at 772 (Smith, J., dissenting).

Thus, the court of appeals decisions rejecting Article II challenges to the FCA's *qui tam* provisions, both before and after the *Stevens* majority earmarked the issue for future consideration by this Court, do not comprise a coherent or cogent body of precedent, but instead actually reflect a longstanding debate among lower court jurists.[4] Indeed, the

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[4] Legal scholars and commentators also continue to debate the Article II issue. *See, e.g.*, Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 Wis. L. Rev. 381, 384 (2001) ("Despite

*(footnote continued on next page)*

question of whether the 1986 *qui tam* provisions violate Article II has been percolating at least since July 1989, when the Department of Justice's Office of Legal Counsel prepared a formal Memorandum Opinion for the Attorney General which argued—in remarkably emphatic terms—that the *qui tam* provisions are unconstitutional. Assistant Attorney General William P. Barr's Memorandum stated, for example, as follows:

> [Q]ui tam suits pose a *devastating threat to the Executive's constitutional authority and to the doctrine of separation of powers.* If qui tam suits are

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*(footnote continued from previous page)*

the FCA's long history, its constitutionality is still open to question."); James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993) (scrutinizing the various arguments relied upon by district courts and academics to uphold the constitutionality of the qui tam provisions and concluding that none of these arguments adequately address the constitutional problems that the provision presents); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 348 (1989) (identifying "the constitutional values potentially threatened by the qui tam device" and "analyzing the validity and persuasive force of the arguments they inspire"); Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 Geo. Wash. L. Rev. 609 (1994) (arguing that even qui tam suits brought by executive-branch employees are unconstitutional); Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 Stan. L. Rev. 853, 853 (1997) ("[T]he qui tam provisions of the False Claims Act, which allow private citizens to litigate on behalf of the United States, violate the separation of powers by interfering with the Executive Branch's authority to 'take Care that the Laws be faithfully Executed.'"); *see also* 1 John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.12 (3d ed. 2006) ("Constitutionality Of The Relator's Role").

> upheld, it would mean Congress will have carte blanche to divest the executive branch of its constitutional authority to enforce the laws and vest that authority in its own corps of private bounty hunters.
>
> * * *
>
> The Office of Legal Counsel believes that the qui tam provisions of the False Claims Act are patently unconstitutional. In our view, *this is not even a close question.*

*Constitutionality of the Qui Tam Provisions of the False Claims Act* ("Barr Mem."), 13 U.S. Op. Off. Legal Counsel 207, 208-209 (1989), 1989 WL 595854. Although Assistant Attorney General Barr unequivocally opined, only three years after enactment of the 1986 Amendments, "that qui tam suits brought by private parties to enforce the claims of the United States plainly violate the Appointments Clause of the Constitution," *id.* at 221, one of his successors in the Office of Legal Counsel, Assistant Attorney General Walter Dellinger, in a 1996 Memorandum Opinion for the General Counsels of the Federal Government, "disapprove[d] the Appointments Clause analysis and conclusion of an earlier opinion of this Office." *The Constitutional Separation of Powers Between the President and Congress*, 20 U.S. Op. Off. Legal Counsel 124, 146 n.65 (1996), 1996 WL 876050.

The Department of Justice, by opposing Supreme Court review and defending the constitutionality of the *qui tam* provisions under Article II, is in the odd position of supporting the unabated erosion of its own constitutionally based prosecutorial discretion. This is far more troublesome than mere advocacy of a bizarre litigation position; it represents an attempt by the Executive Branch to condone Congress' breach of the separation of powers, namely congressional tampering with the Executive Branch's Article II duties under the Appointments and Take Care Clauses. By arguing that the *qui tam* provisions pass Article II muster, the

Justice Department (i.e., Executive Branch) in effect is attempting to cede its own prosecutorial duties to Congress, which has simultaneously arrogated and reassigned those duties to private, self-appointed, *qui tam* relators, whom the statute affords virtually unfettered discretion to sue on behalf of the United States. The Court should not permit such a blatant violation of the separation of powers to persist any longer. As Justice Kennedy explained,

> [t]o say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. . . . The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers.

*Clinton v. City of New York*, 524 U.S. 417, 449-50 (1998). (Kennedy, J., concurring) (internal citations omitted).

If the 1986 *qui tam* provisions violate Article II, then 20 years of unconstitutional litigation (primarily against government contractors and health care providers) is enough. Between Fiscal Years 1987 and 2005, more than 5,100 *qui tam* cases were filed, and the number of *qui tam* cases has continued to increase as a proportion of total FCA cases. *See* U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* 25 (2006). But the Justice Department has elected to pursue only a small percentage of *qui tam* suits. *Id.* at 29. Sums recovered in cases where the Department declined to intervene represent less than 5% of recoveries from all *qui tam* suits and less than 3% of total FCA recoveries. *Id.* at 1, 5, 35. In his dissenting opinion in *Riley*, Judge Smith, who analyzed *qui tam* statistics, concluded that the "figures show that the cases in which the

government declines to intervene are generally the meritless cases." *Riley*, 252 F.3d at 767 n.24 (Smith, J., dissenting). Thus, any suggestion that a finding of unconstitutionality "would result in the disablement of an effective law enforcement tool is utterly without support." *Ibid.* The fact that "[i]n many instances, the costs of defending against unsuccessful *qui tam* suits are recoverable against the government" under various contract clauses further diminishes whatever economic benefit the Government derives from the majority of *qui tam* suits. William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 201 (1998). Yet, the filing of *qui tam* suits, including frivolous or otherwise unmeritorious suits that defendants settle to avoid harassment, adverse publicity, strained relations with the Government, and litigation burdens and costs, remains a lucrative business: Between 1986 and 2005, more than $1.6 billion was awarded to *qui tam* relators and their attorneys. GAO at 5.

The 20-year old Article II issue surely requires no further percolation. This Court should grant review and use this case, which squarely presents the Article II question, as the vehicle for completing the *qui tam* constitutional analysis that it began six years ago in *Stevens*. Unlike other *qui tam* appeals, where the United States chose not to intervene at all,[5] here the Government, following investigation, initially declined to intervene, but then based on information discovered in a separate case, elected to intervene only to support *certain* of Respondent Stone's claims. *See* Pet. at 3-4. The carefully considered, *selective* exercise of

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[5] *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *GPM Gas Corp. v. Grynberg*, 277 F.3d 1373 (5th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002).

prosecutorial discretion embodied by the Government's actions in this case only underscores the question of whether Congress, through enactment of the *qui tam* provisions, has impermissibly encroached upon Executive Branch duties and prerogatives regarding conduct of litigation on behalf of the United States.[6]

## II. THE QUI TAM PROVISIONS PRESENT SUBSTANTIAL ARTICLE II ISSUES WORTHY OF THIS COURT'S REVIEW

In reserving the question of whether the FCA's *qui tam* provisions violate the Article II Appointments and Take Care Clauses, this Court's *Stevens* majority was careful to avoid even an implicit endorsement of the dissent's facile assertion that "historical evidence," such as "evidence that private prosecutions were commonplace in the 19th century," is "sufficient to resolve the Article II question." 529 U.S. at 801 (Stevens, J., dissenting). As Justice Scalia cautioned, "[i]t is *only the dissent* that proceeds to volunteer an answer." *Id.* at 778 n.8 (emphasis added).

In his *Riley* dissent, Judge Smith discussed at length why, unlike the issue of Article III standing addressed in *Stevens*, where this Court focused on the historical meaning of "Cases and Controversies," 529 U.S. at 774, "history is

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[6] The lower court was "not persuaded that in the circumstances of this case, the separation of powers, as embodied in the Take Care Clause, has been transgressed." Pet. App. 27a. But the court's analysis is based on the erroneous premise that "the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone." *Ibid.* The court of appeals skirted the question of whether there is an Article II violation where, as actually happened here, a relator prosecutes at least some of his claims without the Government's active participation or support.

not controlling" on the separate Article II question. *Riley*, 252 F.3d at 772 (Smith, J., dissenting). For example, he noted that "at the time the first *qui tam* acts were passed, the executive was in its infancy . . . . Thus, the exigencies of a weak Executive led Congress to pass a number of *qui tam* acts." *Id.* at 774. "[T]he encroachment on the Executive was less than it is today, because the Executive now exists as a robust branch that could prosecute the claims be[en] given to relators by the FCA." *Id.* at 775 n.38. *See also* Barr Mem. at 232 ("History cannot save qui tam"); *id.* at 237 ("Congress's aggrandizing enactments should not serve as conclusive precedent on the scope of Congress's own authority.").

In its opinion below, the Tenth Circuit, although relying upon *Riley*, appears to have abandoned any attempt at a history-based rationale for upholding the *qui tam* provisions under Article II. Nevertheless, the lower court's Appointments Clause and Take Care Clause analyses are circular and unconvincing, and they only underscore the need for this Court's review.

1. **Appointments Clause**, U.S. Const., Art. II, § 2, cl. 2. Writing for the Court in *Edmund v. United States*, 520 U.S. 651, 659 (1997), Justice Scalia emphasized that "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag v. Comm'r of IRS*, 501 U.S. 868, 878 (1991)).

In *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976), the Court explained "that the term 'Officers of the United States' as used in Art. II . . . is a term intended to have *substantive meaning*" (emphasis added). "[I]ts fair import is that any

appointee *exercising significant authority* pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article." *Id.* at 126 (emphasis added); *see also Edmund*, 520 U.S. at 662 ("The exercise of 'significant authority pursuant to the laws of the United States' marks . . . the line between officer and nonofficer") (quoting *Buckley*).

The Court held in *Buckley* that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language" of the Appointments Clause. 424 U.S. at 140. The FCA's *qui tam* provisions violate the Appointments Clause because they empower private relators, who have not been appointed by the Executive Branch (or any other Branch), to function as "Officers of the United States" by "exercising significant authority pursuant to the laws of the United States," *id.* at 126, specifically the "primary responsibility" for conducting litigation on behalf of the United States, *id.* at 140.[7]

The statute provides that "[a] person may bring a civil action for a [FCA] violation . . . for the United States Government," and "[t]he action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1) ("Actions by private persons"). *See also Stevens*, 529 U.S. at 774 n.4 (noting that "a *qui tam* relator is, in effect, suing as a *partial*

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[7] Self-appointed *qui tam* relators are not appointed by any branch of the Government. Thus, the FCA does not provide for the type of limited "interbranch appointments" which the Court countenanced in *Morrison v. Olson*, 487 U.S. 654, 675 (1988). Moreover, Appointments Clause violations are not predicated on whether Congress has arrogated Executive Branch power to itself. *See Freytag v. Comm'r of IRS*, 501 U.S. at 878.

*assignee* of the United States"). Regardless of whether the Government intervenes, the *awesome* power that the FCA assigns to *any* person who chooses to commence a *qui tam* action "for" and "in the name of" the United States represents, in and of itself, a serious violation of the Appointments Clause (and the Take Care Clause too). Further, "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). Even if the Government intervenes as to some or all claims, the relator continues to act as a party with significant rights. *Id.* § 3730(c)(1), (2). Here, Respondent Stone effectively led the litigation, not only during the six year period prior to the Government's intervention, but also after the Government intervened to support some, but not all, of Stone's claims. *See* Pet. at 25. "There can be no doubt that qui tam relators are exercising significant governmental power . . . to level fraud charges against other private citizens and hail them into court to answer to these alleged public offenses, with the possibility of collecting not only damages but substantial civil penalties." Barr Mem. at 222.

The lower court's circular holding that *qui tam* relators are not "'officers' for purposes of Article II" because they "do not serve in any office of the United States" not only begs the question of whether they are officers, but also trivializes the Appointments Clause. Pet. App. 25a. Rather than heeding this Court's admonition to give the term "Officers of the United States" its intended "substantive meaning," *Buckley*, 424 U.S. at 126, and not limit the term to the ancient formalistic definition provided in *United States v. Germaine*, 99 U.S. 508, 509-510 (1879), the court of appeals, did precisely the latter. Relying upon *Germaine* and *Aufmordt v. Hedden*, 137 U.S. 310 (1890), the court elevated form over substance, focusing, for example, on the fact that relators "are not entitled to the benefits of officeholders, such as drawing a government salary." Pet.

App. 25a. The Fifth Circuit's opinion in *Riley*, 252 F.3d at 757-58, suffers from the same faulty logic.

"The Court has twice held . . . that persons litigating on behalf of the United States are officers of the United States." *Riley*, 252 F.3d at 768 (citing *Buckley*, 424 U.S. at 113, 140; *Morrison*, 487 U.S. at 671 n.12). Because the statute vests *qui tam* relators with significant authority to initiate, conduct, and settle civil FCA litigation on behalf of the United States, they are "Officers of the United States" within the Framers' intended substantive meaning of that term. As a result, the *qui tam* provisions violate the Appointments Clause because they enable relators to appoint themselves to act as Government officers with broad prosecutorial authority. Further, as in *Riley*, the lower court here "ignores . . . the question that logically follows its conclusion that relators are not officers: whether non-officers may prosecute claims owned by the United States." *Id.* at 767 (Smith, J., dissenting). "Supreme Court precedent makes it plain that the answer to this question is no." *Id.* at 768.

2. **Take Care Clause,** U.S. Const., Art. II, § 3. The exercise of prosecutorial discretion to enforce the laws of the United States is an Executive Branch function inherent in the Take Care Clause. *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"). In *Morrison v. Olson*, 487 U.S. at 696, the Court held that in order to avoid violation of the Take Care Clause, a statute divesting the Executive Branch of some measure of prosecutorial discretion must "give the Executive Branch sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties."

As Petitioners explain, none of the statutory safeguards which the *Morrison* majority held gave the

Attorney General "sufficient control" over court-appointed independent counsels, are present in the FCA *qui tam* relator provisions. *See* Pet. at 29. "Qui tam is far more dangerous: there is simply no way to cage this beast." Barr Mem. at 211. One highly significant difference with the independent counsel provisions considered in *Morrison*, is that *qui tam* relators are private, self-appointed individuals, who function as Officers of the United States even though their interests do not necessarily coincide with those of the Government. This Court has noted that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (holding that 1986 FCA Amendments do not apply retroactively).

As a result, *qui tam* relators frequently commence litigation "for the United States Government," and "in the name of the Government," 31 U.S.C. § 3730(b)(1), which the Government itself, in exercising its Article II prosecutorial discretion, either would not commence, or continue to pursue, for any number of reasons, including of course, lack of merit. Nevertheless, for reasons unrelated to the "public good," *qui tam* relators can vigorously pursue their statutory "right to conduct the action," *id.* §§ 3730(b)(4)(B), 3730(c)(3), such as by exacting a substantial monetary settlement from the defendant (including a tempting 15%—30% bounty for the relator and his attorney). And if the Government, following investigation, intervenes and then seeks dismissal or settlement, *qui tam* relators can object, *id.* §§ 3730(c)(2)(A), (B), and seek court approval to proceed with prosecution of the action. *See* Barr Mem. at 216-220 (discussing the statute's adverse impact on the Government's enforcement role).

This private FCA enforcement scheme, which Congress enacted to pressure the Executive Branch because

it was dissatisfied with that Branch's pursuit of defense contractor fraud during the 1980s, *see* Pet. at 29-30, has been repeatedly abused by the very individuals to whom Congress has entrusted and transferred the Executive Branch's prosecutorial discretion. The principal harm to the Government, industry, and the public is the pursuit of frivolous or unmeritorious, and sometimes vexatious, *qui tam* suits, especially after the Government (the Department of Justice and/or Department of Defense or other supposedly defrauded agency) determines that there has been no misconduct. *See, e.g., Hughes Aircraft Co.*, 520 U.S. at 943 n.1 (noting that the Government ultimately reversed its preliminary determination that it had been improperly charged and concluded that the defense contractor defendant "actually benefited" the Government financially); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) (affirming dismissal of *qui tam* suit against defense contractor where, based in part on trial testimony of numerous Air Force witnesses, the quality of defendant's drawings met its contractual obligations and the Air Force's expectations). *See generally* Kovacic, *supra* at 232 ("That the purchasing agencies or the Department of Justice regard such a suit as ill-conceived does not impede the initiation and prosecution of such cases by relators.").

To say the least, unmeritorious *qui tam* actions "waste defendants' and the courts' resources," as well as those of the Justice Department. Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992). Because "[r]elators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists," Barr Mem. at 220, unwarranted *qui tam* actions also can have a chilling effect on the working relationships between Government agencies and their contractors. *See* Kovacic, *supra* at 239 (*qui tam*

provisions are "a serious impediment"). The Tenth Circuit's expansive interpretation of the statute's "original source" jurisdictional requirement only opens the floodgates wider.

Here, because the Government eventually intervened, the Tenth Circuit was unconvinced "that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities." Pet. App. 27a. In so concluding, the court of appeals mistakenly assumed that once the Government intervenes, the relator has no significant continuing role to play in the litigation. That is neither true in general nor in this case, especially since the Government, exercising its prosecutorial discretion, declined to support certain of Respondent Stone's claims, which he continues to pursue on his own. As indicated above, *supra* n.6, the lower court, although purporting to address the circumstances of this case, made no effort to defend the constitutionality of the *qui tam* provisions under the Take Care Clause where the Government exercises its discretion to support some but not all of the relator's claims. Stone's right under the FCA *qui tam* provisions to pursue the very claims which the Government carefully considered and then declined to support dramatically highlights the statute's Article II infirmities. The Article II *qui tam* question is not "clad, so to speak, in sheep's clothing . . . this wolf comes as a wolf," *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting), and it continues to cry out for this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2006

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

(6)

No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## JOINT APPENDIX

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# JOINT APPENDIX
# TABLE OF CONTENTS

Page

United States Court of Appeals for the Tenth Circuit Relevant Docket Entries: *United States of America ex rel. James S. Stone and United States of America v. Rockwell International Corp. and Boeing North American, Inc.*, No. 99-1351 ..... 1

United States District Court for the District of Colorado Relevant Docket Entries: *Stone et al. v. Rockwell Automation, et al.*, No. 1:89-cv-01154-RPM ..... 11

Complaint and Jury Demand (July 6, 1989) (excerpts) (CA[1] 81 to 97) ..... 38

Plaintiff's Exhibit 1: Plea Agreement and Statement of Factual Basis (Mar. 26, 1992) (excerpts) (CA 1861, 1864-72, 1874-91) ..... 50

Brief in Support of Defendant's Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction (with motion) (Dec. 15, 1992) (CA 116 to 135) ..... 73

Affidavit of Christopher J. Koenigs (Dec. 15, 1992):

Exhibit 1, Application and Affidavit of Mr. Lipsky (excerpts) (CA 0139 to 0145, 152 to 154, 157, 163) ..... 94

---

[1] "CA __" refers to the pagination used in the Tenth Circuit Appendix.

Exhibit 8, Plaintiff James S. Stone's Amended Responses to Interrogatory Nos. 1(d), (l), (m), (n) and (o), 5, 6, 7, 11(a), 12-16, 21(d) and 23(a), (b) and (d) of Defendant's First Interrogatories (excerpts) (CA 0225 to 0226)..... 102

Exhibit 9, Excerpts from the Deposition of James Stone (CA 0229 to 0231)..... 105

Exhibit 10, 06/1989 Newspaper Articles (photos and marginalia omitted) (CA 0232 to 0252)..... 113

Affidavit of James S. Stone in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Feb. 27, 1993) (CA 290-310)..... 169

Exhibit B, Excerpts from Plaintiffs' Consolidated Answers and Responses to Discovery (CA 375, 380, 384, 386 to 387, 390 to 393, 394 to 395)..... 184-223

Exhibit C, Excerpt from Engineering Calculation Sheets (CA 430)..... 224

Exhibit D, March 20, 1984 letter from Stone to Cerise (CA 438)..... 226

Exhibit E, Engineering Order (CA 439)..... 228

Exhibit F, October 1, 1985 memo from Stone to Eden (CA 440)..... 229

Exhibit G, Records from Health and Physics Department (excerpts) (CA 442)..... 231

Exhibit H, Employee Suggestion Form (CA 447 to 451) ..... 232

Exhibit I, May 28, 1985 Memorandum from Eden to Stone (CA 452) ..... 242

Exhibit J, June 28, 1985 letter from Eden to Handschy (CA 453) ..... 243

Exhibit K, January 15, 1986 letter from Stone to O'Neil (CA 454) ..... 245

Exhibit L, CPAF Rating and Functional Performance Areas (CA 455 to 456) ..... 247

Exhibit M, July 28, 1987 FBI Interview of Stone (CA 457 to 459) ..... 250

Exhibit N, February 17, 1988 FBI Interview of Stone (CA 460 to 463) ..... 254

Exhibit O, Miscellaneous Reports of Stone's Communications with the FBI (CA 464 to 471) ..... 259

Exhibit P, Complaint in *Stone v. Rockwell et al.* (Jefferson County, Colo.) (excerpts) (CA 472, 476 to 481) ..... 268

Exhibit Q, Plaintiff's Confidential Disclosure Statement of Material Evidence and Information (excerpts) (CA 491 to 523, 559 to 560) ..... 276

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction (Mar. 5, 1993) (CA 259 to 284) ..... 304

Affidavit of Christopher J. Koenigs (Apr. 12, 1993):

Exhibit 3, James S. Stone's Third Supplemental Responses to Rockwell's Discovery Requests (June 5, 1992) (excerpts) (CA 710 to 717) ..... 327

Exhibit 6, James S. Stone's Amended Response to Rockwell's Discovery Requests (Oct. 27, 1992) (excerpts) (CA 729 to 730) ..... 338

Exhibit 19, Supplement to Statement of Michael J. Norton (excerpts) (CA 831 to 832) ..... 341

Boulder Daily Camera: *Pat Schroeder calls Flats whistleblower 'a hero'* (CA 889.48) ..... 344

Government Motion for Leave to Intervene (Nov. 13, 1995) (CA 0900 to 0901) ..... 347

Declaration of John A. Kolar (Nov. 13, 1995) (CA 0902 to 0906) ..... 349

Supplemental Declaration of John A. Kolar (Dec. 20, 1995) (CA 0908 to 0940) ..... 354

Memorandum Opinion and Order (Nov. 19, 1996) (CA 964 to 971) ..... 382

Transcript of Scheduling Conference (Dec. 5, 1996)

(excerpts) (SA[2] 78, 82 to 88) ..... 389

Amended Complaint (Dec. 20, 1996) (CA 972 to 1006) ..... 395

Answer to Amended Complaint (Jan. 21, 1997) (excerpt) ..... 427

Preliminary Pretrial Conference Transcript of Proceedings (Jan. 21, 1997) (excerpt) ..... 428

Appendix to Defendants' Motion in Limine, excerpt from Affidavit of Mr. Lipsky (Nov. 10, 1997) ..... 429

Scheduling Order (Dec. 5, 1997) (excerpt) ..... 430

Stipulation (Feb. 17, 1998) ..... 434

Defendants' Memorandum of Law Supporting Their Proposed Jury Instructions Relating to False Claims Act Elements of Liability (Sept. 21, 1998) (excerpts) (CA 1628 to 1632) ..... 437

Transcript of Status Conference (Sept. 25, 1998) (excerpt) (CA 1051 to 1062) ..... 443

Mr. Stone's Response to Defendants' Memorandum on Proposed Jury Instructions Pertaining to Mr. Stone's Role as Relator (Oct. 9, 1998) (excerpts) ..... 447

Final Pretrial Order (Feb. 4, 1999) (excerpts) ..... 459

---

[2] "SA" refers to the Mr. Stone's Supplemental Appendix before the Tenth Circuit.

Plaintiff's Statement of Claims (attached to Final Pretrial Order) ..... 463

False Statements and Claims by Fiscal Year and Date (attached to Final Pretrial Order) ..... 494

Excerpts from Trial Transcript, Day 2 (Feb. 23, 1999) ..... 508

Excerpts from Trial Transcript, Day 3 (Feb. 24, 1999) ..... 509

Excerpts from Trial Transcript, Day 4 (Feb. 25, 1999) ..... 514

Excerpts from Trial Transcript, Day 5 (Feb. 26, 1999) ..... 516

Excerpts from Trial Transcript, Day 6 (Mar. 1, 1999) ..... 523

Excerpts from Trial Transcript, Day 7 (Mar. 2, 1999) ..... 525

Excerpts from Trial Transcript, Day 13 (Mar. 11, 1999) ..... 531

Excerpts from Trial Transcript, Day 15 (Mar. 16, 1999) ..... 533

Excerpts from Trial Transcript, Day 20 (Mar. 23, 1999) ..... 538

Excerpts from Trial Transcript, Day 21 (Mar. 24, 1999) ..... 540

Excerpts from Trial Transcript, Day 24 (Mar. 29, 1999) ..... 543

Jury Verdict (Apr. 1, 1999) (CA 1119 to 1121) ..... 548

Newspaper Articles (CA 1342 to 1345) ..... 551

James S. Stone's Response to Defendants' Memorandum Regarding Entry of Judgment (May 4, 1999) (excerpts) (CA 1408, 1416 to 1424) ..... 559

Plaintiff United States' Supplemental Responses to Defendants' Memorandum Regarding Entry of Judgment (May 17, 1999) (SA 23 to 28) ..... 568

Defendants' Reply to James S. Stone's Response to Defendants' Memorandum Regarding Entry of Judgment (May 6, 1999)

Exhibit 6, Stone's First Supplemental Responses dated Apr. 4, 1992) (excerpts) (CA 1529 to 1530) ..... 573

Transcript of Oral Argument on Judment Issues (May 7, 1999) (excerpts) ..... 577

Order Reserving Ruling on Motions for Fees and Expenses (June 10, 1999) (excerpt) (CA 1570) ..... 578

Appellants' Opening Brief (Feb. 7, 2000) (excerpts) ..... 580

Appellee/Cross-Appellant James S. Stone's Opening Response Brief (Mar. 17, 2000) (excerpts) ..... 582

Plaintiff James. S. Stone's Motion for a Finding on Limited Remand that Mr. Stone Made the Requisite Disclosures to the Government Prior to Filing This Action (Apr. 3, 2002) ..... 584

Plaintiff James S. Stone's Memorandum in Support of Motion for a Finding on Limited Remand (Jan. 21, 2003) (excerpts) ..... 587

Plaintiff-Appellee/Cross-Appellant James S. Stone's Motion to Supplement the Record on Appeal (Jan. 28, 2003) (excerpts) ..... 591

Affidavit of James S. Stone, including Exhibit A (Dec. 23, 2002) ..... 597

Declaration of Hartley David Alley (Dec. 23, 2002) ..... 614

Order Denying Motion for Reconsideration And To Supplement The Record (Jan. 21, 2003) ..... 626

Order Granting Motion for Award of Attorneys' Fees (Apr. 5, 2006) ..... 629

Affidavit of Maria T. Vullo in Support of Motion for Attorney Fees and Expenses (Apr. 22, 2004) (excerpt) ..... 630

# RELEVANT DOCKET ENTRIES

## U.S. Court of Appeals for the Tenth Circuit

## No. 99-1351

| | |
|---|---|
| 8/10/99 | [1255290] Civil case docketed. Preliminary record filed. DATE RECEIVED: 8/9/99. Transcript order form due 8/20/99 for Charlotte Hoard in 99-1351, 99-1352, and 99-1353 pursuant to R.42.1. Docketing statement due 8/20/99 for USA ex rel, Stone in 99-1351, for Boeing No. American and Rockwell Internat'l. in 99-1352, and for United States in 99-1353. Notice of appearance due 8/20/99 for Boeing No. American, Rockwell Internat'l. USA ex rel, Stone and USA 99-1351, 99-1352, and 99-1353. (afw) [99-1351 99-1352 99-1353] |
| * * * | |
| 8/19/99 | [1258138] Notice filed that the transcript is already on file in district court. Notice due that record is complete 8/25/99 for Richard P. Matsch. (afw) [99-1351 |
| 8/19/99 | [1258140] Docketing statement filed by USA ex rel, Stone in 99-1351. Original and 4 copies. c/s: y. (afw) [99-1351] |
| * * * | |
| 10/27/99 | [1275087] Filed notice record is complete 10/27/99. (nak) [99-1351 99-1352 99-1353] |
| * * * | |

2/7/00 [1300144] Brief filed by Rockwell Internat'l., Boeing No. American in 99-1351, 99-1352, 99-1353. Original and 7 copies. c/s: y. Served on 2/7/00. Oral argument? y. Appendix filed (9 volumes). Original and 1 appendix copy. Appendix Pages: 5346. (pdw) [99-1351 99-1352 99-1353]

2/7/00 [1511864] Oversized record filed. Record can be located at Section: I Shelf: 2 (jaz) [99-1351 99-1352 99-1353]

* * *

3/20/00 [1310564] Brief filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 7 copies. c/s: y. Oral Argument? y (afw) [99-1351 99-1352 99-1353]

* * *

3/20/00 [1310573] Appendix filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 1 copy. Appendix pages: 145. c/s: y. (afw) [99-1351 99-1352 99-1353]

* * *

3/22/00 [1311730] Appellee's motion to file an oversize brief 11,666 long [99-1351, 99-1352, 99-1353] filed by USA ex rel, Stone and United States. Original and 3 copies. c/s: y (nak) [99-1351 99-1352 99-1353]

| | |
|---|---|
| 3/28/00 | [1312528] Order filed by Judges Porfilio, Murphy granting in part United States, ex rel. James Stone's motion to file an oversize brief. The governments' brief may not exceed 7000 words, the brief remains due on or before 4/7/00 [1311730-1] in 99-1351, 99-1352, 99-1353. Parties served by mail. (nak) [99-1351 99-1352 99-1353] |
| 4/13/00 | [1317199] Brief filed by United States in 99-1351, 99-1352 and 99-1353. Original and 7 copies. c/s: y. Oral Argument? y. Answer and reply brief due for Rockwell on 5/8/00. (kf) [99-1351 99-1352 99-1353] |

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|---|---|
| 5/10/00 | Brief filed by Appellant/Cross-Appellee Rockwell Internat'l. in 99-1351, 99-1352 and in 99-1353. Original and 7 copies. c/s: y. Supplemental Appendix Volume X (Original and 1 copy) filed by Rockwell Internat'l. Reply brief due for Stone on 5/24/00. (kf) [99-1351 99-1352 99-1353] |

* * *

| | |
|---|---|
| 9/24/01 | [1450136] Terminated on the Merits after Oral Hearing; Judgment Affirmed; Written, Signed, Published. Briscoe, concurring and dissenting on the conclusion that James Stone qualifies as an "original source" under 31 U.S.C. 3730(e)(4)(E); Holloway, authoring judge; Politz. [99-1351, 99-1352, 99-1353] (kf) [99-1351 99-1352 99-1353] |
| 9/27/01 | [1451137] Amendment to opinion (correction of site referenced) filed. (gah) [99-1351 99-1352 99-1353] |

11/2/01 [1460970] Petition for rehearing en banc [99-1351, 99-1352, 99-1353] filed by Rockwell Internat'l. in 99-1351, 99-1352 and 99-1353. Original and 14 copies. c/s: y (afw) [99-1351 99-1352 99-1353]

* * *

11/23/01 [1465412] Response to Rockwell's petition for rehearing en banc filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353 submitted to court. Original and 14 copies. c/s: y. (jal) [99-1351 99-1352 99-1353]

* * *

12/11/01 [1469690] Appellants' motion filed by Appellants Rockwell Internat'l and Boeing No. American in 99-1351, 99-1352, and 99-1353 to strike argument one in Stone's response or in the alternative, for leave to file reply to Stone's response. Original and 4 copies. c/s: y. (gah)

12/11/01 [1469692] Reply to Stone's response received from Rockwell Internat'l and Boeing No. American in 99-1351, 99-1352, and 99-1353 (reply attached to motion), but not filed. Original and 4 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

* * *

12/17/01 [1471268] Response to motion to strike argument, filed by USA ex rel, Stone in 99-1351, 99-1352, and 99-1353. Original and 14 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

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|---|---|
| 3/4/02 | [1490712] Order filed by Judges Briscoe, Holloway and Politz granting Petition for rehearing for the limited purpose of modifying the opinion and ordering a limited remand to the district court and denying suggestion of rehearing en banc. [1460970-1] This court retains jurisdiction in 99-1351, 99-1352 and 99-1353. (afw) [99-1351 99-1352 99-1353] |
| 3/4/02 | [1490739] Order filed by Judges Briscoe, Holloway and Politz reopening appeal and remanding case for the limited purpose of modifying the opinion and ordering a limited remand to the district court for the purpose of that court making findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters. Upon completion of those proceedings, a supplemental record will be transmitted to this court. On all other issues except that requiring the additional factual findings and conclusions on saltcrete, pondcrete and irrigation matters, the rulings made previously in our opinion are undisturbed. (See Order on Rehearing) Supplemental record on appeal due 4/30/02 for Richard P. Matsch in 99-1351, 99-1352 and 99-1353. Parties served by mail. (afw) [99-1351 99-1352 99-1353] |
| 12/23/02 | [1573918] Supplemental record filed: 3 Volumes—Supp. ROA Pages: 3 volumes. Copy filed in Volumes: y. (jal) [99-1351 99-1352 99-1353] |

12/23/02 [1573941] Appellee's motion for order vacating judgment for qui tam plaintiff James S. Stone in accordance with district court's findings and conclusions on limited remand filed by Rockwell Internat'l. in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (jal)

12/26/02 [1574169] Response and motion for extension of time of plaintiff-appellee/cross-appellant James S. Stone to Rockwell's motion for and order vacating judgment for Qui Tam plaintiff 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (klp) [99-1351 99-1352 99-1353]

12/26/02 [1574171] Response and motion for extension of time of plaintiff-appellee/cross-appellant James S. Stone to Rockwell's motion for an ordere vacating judgment for Qui Tam Plaintiff Document [1574169-1] in 99-1351, 99-1352 and 99-1353 submitted to court. (klp) [99-1351 99-1352 99-1353]

1/6/03 [1575917] Order filed by Judges Briscoe and Holloway- the panel has decided that they shall proceed as a two-judge panel in view of the death of Judge Politz. Appellees- Cross-Appellants' motion for extension of time to respond to appellants-cross-appellees' motion for order vacating judgment is granted. Response to motion due 1/29/03 for USA ex rel, Stone and United States in 99-1351, 99-1352, and 99-1353. Parties served by mail. (gah) [99-1351 99-1352 99-1353]

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1/24/03 [1582687] Supplement to Preliminary record on appeal transmitted on 8/9/99 and 8/12/99 filed. (afw) [99-1351 99-1352 99-1353]

1/29/03 [1583009] Appellee/cross-appellant James S. Stone's (1) response to Rockwell's motion dated 12/23/02 for an order vacating judgment for Qui Tam plaintiff and (2) motion for a ruling affirming the judgment in its entirety filed by USA ex rel, Stone in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (klp) [99-1351 99-1352 99-1353]

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2/18/03 [1588370] Reply brief in support of motion for order vacating judgment filed by Rockwell Internat'l. in 99-1351, 99-1352, and 99-1353. Original and 3 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

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3/7/03 [1593825] Reply in support of cross-motion for ruling affirming judgment in its entirety filed by USA ex rel, Stone and United States in 99-1351, 99-1352 and 99-1353. Original and 3 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

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3/5/04 [1691281] Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Unpublished. Briscoe, dissenting; Holloway, authoring judge; Hartz. [99-1351, 99-1352, 99-1353]. Parties served by mail on 3/5/04. (na) [99-1351 99-1352 99-1353]

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4/16/04 [1701567] Petition for rehearing in banc filed by Rockwell Internat'l.and Boeing No. American in 99-1351, 99-1352 and 99-1353. Original and 18 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

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4/22/04 [1702976] Appellee's motion for attorney fees [99-1351, 99-1352, 99-1353, 03-1093] filed by USA ex rel, Stone. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

4/22/04 [1702981] Declaration of Hartley David Alley regarding fees filed by USA ex rel, Stone in 99-1351, 99-1352, 99-1353, and 03-1093. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

4/22/04 [1702983] Affidavit of Maria T. Vullo in support of motion for attorney fees and expenses filed by USA ex rel, Stone 99-1351, 99-1352, 99-1353, 03-1093. Original and 3 copies. c/s: y (na) [03-1093 99-1351 99-1352 99-1353]

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5/6/04 [1706680] Response filed by USA ex rel, Stone in 99-1351, 99-1352, and 99-1353 to Rockwell's petition for rehearing and submitted to court. Original and 18 copies. c/s: y. (gah) [99-1351 99-1352 99-1353]

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1/4/06 [1875325] Order filed by Judges Briscoe, Holloway & Hartz denying rehearing and rehearing en banc [1701567-1] in 99-1351, 99-1352, 99-1353. (sts) [99-1351 99-1352 99-1353]

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| 4/5/06 | [1904818] Order filed by Judges Briscoe, dissenting, Holloway and Hartz granting Appellee Stone's motion for attorney fees [1702976-1] and remanding to district court for a determination of a reasonable fee award in 99-1351, 99-1352 and 99-1353. Parties served by mail. (afw) [99-1351 99-1352 99-1353] |
| 4/10/06 | [1906863] Petition for writ of certiorari filed on April 4, 2006. Supreme Court Number 05-1272. (sts) [99-1351 99-1352 99-1353] |
| 10/11/06 | [1964030] Supreme Court order dated 9/26/06 granting certiorari limited to question 1 presented by the petition filed. (sts) [99-1351 99-1352 99-1353] |
| 10/19/06 | [1966565] Certiorari record transmitted to Supreme Court. Index follows: Volume 1 - 10th Cir. dockets for nos. 99-1351, 99-1352 & 99-1353; motion to dismiss; response to motion to dismiss; response to motion to dismiss; reply in support of motion to dismiss; order referring motion to dismiss to merits panel; supplemental authority; submission order; supplemental authority; judgment and opinion; Volume 2 - amendment to opinion; petition for rehearing en banc; response to petition for rehearing; motion to strike or file reply; order on rehearing; motion to vacate judgment;; response to motion to vacate/motion for extension; order re: change in panel; Volume 3 - response to motion to vacate/x-motion for enforcement; motion to supplement; response to motion to supplement; reply in support of motion to vacate/response to x-motion for enforcement; reply in support of motion for enforcement; reply in support of motion to supplement; order and judgment; petition for rehearing en banc; response to |

petition for rehearing; supplemental authority; supplemental authority; order denying rehearing en banc; Enclosed separately - appendix and supplemental appendix to motion to dismiss; opening brief and appendix; brief of amici curiae; opening/response brief and supplemental appendix; opening response brief; answer/reply brief and supplemental appendix; reply brief; reply brief; 3-volume supplemental record on appeal (d.c.); 2nd supplemental appendix; clerk's statement re: record; and clerk's certificate. (sts) [99-1351 99-1352 99-1353]

**U.S. District Court for the District of Colorado**

**No. 1:89-cv-01154-RPM**

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| 07/06/1989 | N/A | Complaint [not on docket sheet because filed under seal] |
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| 12/28/1990 | 26 | Motion by defendant Rockwell Intl Corp to dismiss case before Judge Jim R. Carrigan (lam) Entered: 12/31/1990) |
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| 12/28/1990 | 28 | BRIEF by defendant Rockwell Intl Corp in support of motion to dismiss case before Judge Jim R. Carrigan [26-1] (lam) (Entered: 12/31/1990) |
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| 01/14/1991 | 31 | RESPONSE by plaintiff James S. Stone to motion to dismiss [26-1] (lam) (Entered: 01/15/1991) |
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| 04/08/1991 | 38 | RESPONSE by plaintiff James S. Stone to motion for protective order staying discovery [36-1] (lam) (Entered: 04/09/1991) |
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| 08/08/1991 | 42 | ORDER by Judge Jim R. Carrigan: dft's mtn to dismiss is granted in part and denied in part [26-1]; as to plf's first claim, the dft's mtn to dismiss is denied; as to plfs second claim, the dft's mtn is granted; plfs second claim is dismissed; and parties are to meet w/in 11 days in attempt to settle remaining claim; cs1 shall report in writing w/in 15 days after they meet re settlement negotiations (cc: all counsel) ; entry date: 8/12/91 (lam) (Entered: 08/12/1991) |
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| 09/09/1991 | 46 | ANSWER by defendant Rockwell Intl Corp (lam) (Entered: 09/11/1991) |
| | | * * * |
| 11/07/1991 | 53 | MINUTE ORDER: by Judge Jim R. Carrigan; Jury Trial 8:30 1/4/93 (cc: all counsel) ; entry date : 11/12/91 (lam) (Entered: 11/12/1991) |
| | | * * * |
| 03/26/1992 | 63 | NOTICE by USA declining to intervene in this action (lam) (Entered: 03/27/1992) |
| | | * * * |
| 05/21/1992 | 65 | MOTION by defendant Rockwell Intl Corp to compel adequate written discovery responses by plf James S. Stone (lam) (Entered: 05/22/1992) |
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| 05/26/1992 | 69 | Second supplemental RESPONSES to dft's first interrogatories by plaintiff James S. Stone to case [0-0] (lam) (Entered: 05/27/1992) |

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| 08/28/1992 | 76 | MOTION by defendant Rockwell Intl Corp for sanctions against plf for failure to comply with discovery order (in bound volume) (gms) (Entered: 08/28/1992) |
| 08/28/1992 | 77 | Attachments (APPENDIX) filed by defendant Rockwell Intl Corp to motion for sanctions against plf for failure to comply with discovery order [76-1] (in bound volume) (gms) (Entered: 08/28/1992) |

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| 09/09/1992 | 82 | COURTROOM MINUTES (Hearing on dft Rockwell's second mtn to compel responses to req for prod # 5 & 6 and dft's mtn for sanctions against plf for failure to comply with discovery order) by Magistrate Judge Bruce D. Pringle: Parties inform court request for production #6 has been resolved; ORDERED request #5 of the mtn to compel is taken under advisement, plfs disclosure statement submitted to court for in camera review; ORDERED plf to provide to dft a list of each category of area of violation, plf to identify each regulation and statute that was violated and supports the claims in the lawsuit ... documents and information to be supplied w/in 40 days or on or before 10/20/92 [74-1]; ORDERED mtn for sanctions is granted in part. Only as to plfs 3rd suppl response, dft is allowed reasonable and necessary fees in determining responses were inapplicable. Dft to submit an affidavit on or before 9/23/92, plf may respond to affidavit on or before 10/5/92. In all other aspects, the mtn for sanctions is denied [76-1]; ; Mag Conf 3:30 10/30/92 ; entry date: 9/16/92 (lam) (Entered: 09/16/1992) |

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| 10/29/1992 | 92 | MOTION by defendant Rockwell Intl Corp for order limiting the evidence plf can present at trial (lam) Modified on 11/04/1992 (Entered: 10/30/1992) |
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| 12/09/1992 | 120 | MOTION by plaintiff James S. Stone for partial summary judgment (on the issue of dft's liability under False Claims Act) before Judge Jim R. Carrigan (lam) (Entered: 12/09/1992) |
| 12/09/1992 | 121 | Memorandum BRIEF by plaintiff James S. Stone in support of motion for partial summary judgment [120-1] (lam) (Entered: 12/09/1992) |
| | | * * * |
| 12/15/1992 | 125 | MOTION by defendant Rockwell Intl Corp to dismiss complaint before Judge Carrigan for lack of subj matter jurisdiction (lam) Modified on 01/14/1994 (Entered: 12/16/1992) |
| 12/15/1992 | 126 | BRIEF by defendant Rockwell Intl Corp in support of motion to dismiss complaint for lack of subject matter jurisdiction before Judge Jim R. Carrigan [125-1] (lam) (Entered: 12/16/1992) |
| | | * * * |
| 03/08/1993 | 149 | MEMORANDUM OF LAW by plaintiff James S. Stone in opposition to motion to dismiss complaint for lack of subject matter jurisdiction before Judge Jim R. Carrigan [125-1] (lam) (Entered: 03/08/1993) |

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| 03/08/1993 | 150 | AFFIDAVIT of James S. Stone regarding opposition brief [149-1] (lam) (Entered: 03/08/1993) |

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| 04/13/1993 | 154 | REPLY Brief by defendant Rockwell Intl Corp in support of dft's motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 04/13/1993) |

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| 04/13/1993 | 156 | AFFIDAVIT of John F. McNett (faxed signature) (lam) (Entered: 04/13/1993) |
| 04/13/1993 | 157 | AFFIDAVIT of Christopher J. Koenigs (lam) (Entered: 04/13/1993) |

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| 05/12/1993 | 162 | SURREPLY Memorandum of law by plaintiff James S. Stone in opp to dft's motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 05/13/1993) |

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| 05/20/1993 | 165 | Sur-SURREPLY brief by defendant Rockwell Intl Corp in support [125-1] of motion to dismiss complaint for lack of subject matter jurisdiction [125-1] (lam) (Entered: 05/21/1993) |

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| 11/30/1993 | 166 | STATEMENT (Letter) by plaintiff James S. Stone in regards recently decided case and proposed legislation that bear on motion by dft Rockwell to dismiss complaint [125-1] (lam) (Entered: 12/01/1993) |
| | | * * * |
| 12/14/1993 | 169 | Supplemental BRIEF FILED by defendant Rockwell Intl Corp in support of dft's mtn to dismiss [125-1] (lam) (Entered: 12/15/1993) |
| | | * * * |
| 02/02/1994 | 173 | ORDER by Judge Jim R. Carrigan: denying dft's motion to dismiss for lack of subject matter jurisdiction is denied [125-1] ; status report re settlement negotiations 2/17/94 (cc: all counsel) ; entry date: 2/3/94 (lam) (Entered: 02/03/1994) |
| | | * * * |
| 11/07/1995 | 256 | ORDER by Chief Judge Richard P. Matsch Case reassigned to Chief Judge Richard P. Matsch (cc: all counsel) ; entry date: 11/9/95 (lam) (Entered: 11/09/1995) |
| 11/14/1995 | 257 | MOTION by USA to intervene, ex rel. (lam) (Entered: 11/17/1995) |
| 11/14/1995 | 258 | DECLARATION of John A. Kolar as csl for intv plf USA re motion to intervene, ex rel. [257-1] (lam) (Entered: 11/17/1995) |

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| 11/14/1995 | 259 | BRIEF (Memorandum of points & authorities) by intervenor-plaintiff USA in support of motion to intervene [257-1] (lam) (Entered: 11/17/1995) |

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| 12/14/1995 | 271 | RESPONSE by defendant Rockwell Intl Corp to Gov'ts motion to intervene, ex rel. [257-1] (lam) (Entered: 12/15/1995) |

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| 11/19/1996 | 286 | MEMORANDUM, OPINION, AND ORDER: by Chief Judge Richard P. Matsch granting motion to intervene, ex rel. by US [257-1] adding plaintiff USA, ex rel. (cc: all counsel) ; entry date: 11/20/96 (lam) (Entered: 11/20/1996) |

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| 12/20/1996 | 299 | AMENDED COMPLAINT by plaintiff USA, ex. rel. James S. Stone; adding The Boeing Corp., Boeing North American, Inc. (lam) (Entered: 12/20/1996) |

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| 01/21/1997 | 303 | ANSWER by defendants to amended complaint [299-1] (lam) (Entered: 01/22/1997) |

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| 10/01/1997 | 388 | TRANSCRIPT of proceedings before JudgeMatsch of preliminary ptc of 9/26/97 ( 1-57 pages) Prepared By: Federal Reporting Service Inc (lam) (Entered: 10/02/1997)) |
| | | * * * |
| 11/10/1997 | 394 | MOTION by defendant Rockwell Intl Corp in limine re: criminal charges (former empl) Modified on 11/12/1997 (Entered: 11/12/1997) |
| 11/10/1997 | 395 | EXHIBIT 49 to dfts' motion in limine re: criminal charges [394-1] (placed in exhibit room) (former empl) Modified on 11/12/1997 (Entered: 11/12/1997) |
| 11/10/1997 | 396 | APPENDIX (Vols I-V) filed by defendants to motion in limine re: criminal charges [394-1] (placed in exhibit room) (lam) Modified on 11/12/1997 (Entered: 11/12/1997) |
| | | * * * |
| 11/14/1997 | 398 | COURTROOM MINUTES by Chief Judge Richard P. Matsch denying motion in limine re: criminal charges [394-1] ; claim re: plutonium in duct work will be severed attrial; status confheld 11/14/97 , ; further status conf set for 3:00 12/5/97 ; entry date: 11/17/97 Court Reporter: Kathy Terasaki, ECR (former empl) (Entered: 11/17/1997) |

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|---|---|---|
| 11/14/1997 | 399 | ORDER by Chief Judge Richard P. Matsch denying motion in limine re: criminal charges [394-1] (cc: all counsel) ; entry date: 11/17/97 (former empl) (Entered: 11/17/1997) |

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| 04/16/1998 | 424 | AMENDED ANSWER to amended cmp [303-1] by defendant Rockwell Intl Corp, defendant Boeing Corporation, defendant Boeing North Amer (lam) (Entered: 04/17/1998) |

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| 09/21/1998 | 543 | Memorandum of Law (BRIEF) FILED by defendants supporting their proposed jury instructions relating to false claims act elements of liability and damages (lam) (Entered: 09/22/1998) |

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| 09/28/1998 | 555 | TRANSCRIPT of proceedings before Chief Judge Matsch of 9/25/98 Status Conf ( 1-53 pages) Prepared By: Federal Reporting Service Inc (lam) (Entered: 09/29/1998) |

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| 10/09/1998 | 558 | RESPONSE by plaintiff James S. Stone to dfts' memorandum on proposed jury instructions pertaining to Mr. Stone's role as relator re brief [556-1] (lam) (Entered: 10/09/1998) |

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| 10/28/1998 | 565 | Unopposed MOTION by defendants for leave to file reply brief re Stone's alleged role as qui tam relator (former empl) (Entered: 10/29/1998) |
| 10/28/1998 | N/A | Tendered Reply Brief Re Stone's Alleged Role As Qui Tam Relator submitted by defendants pending ruling on motion for leave to file reply brief re Stone's alleged role as qui tam relator [565-1] (former empl) (Entered: 10/29/1998) |

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| 11/20/1998 | 568 | MOTION by plaintiff James S. Stone for leave to file surreply brief re alelged role as qui tam relator (former empl) (Entered: 11/23/1998) |
| 11/20/1998 | N/A | Tendered surreply brief submitted by plaintiff James S. Stone motion for leave to file surreply brief re alelged role as qui tam relator [568-1] (former empl) (Entered: 11/23/1998) |

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| 11/24/1998 | 575 | Supplemental REPLY brief by defendant Rockwell Intl Corp, defendant Boeing North Amer re: Mr. Stone's alleged role as qui tam realtor (former empl) (Entered: 11/27/1998) |
| 11/24/1998 | 576 | SurREPLY by plaintiff James S. Stone to def reply brief re: Mr. Stone's alleged role as qui tam realtor (former empl) (Entered: 11/27/1998) |

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| 02/04/1999 | 616 | PRE- TRIAL ORDER by Chief Judge Richard P. Matsch (cc: all counsel) (former empl) (Entered: 02/05/1999) |

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| 02/12/1999 | 628 | MOTION by plaintiff, defendant, special master, intervenor, plaintiff, defendant for order accepting stipulation to admissibility of exhibits (former empl) (Entered: 02/16/1999) |

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| 02/17/1999 | 630 | STIPULATION re Mr. Stone status as relator or right to relief (former empl) (Entered: 02/18/1999) |

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| 02/22/1999 | 640 | TRANSCRIPT of proceedings of FINAL PRETRIAL CONFERENCE (2/19/99) (pages 1-41) Prepared By: Federal Reporting Service (former empl) (Entered: 02/22/1999) |

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| 02/23/1999 | 643 | TRANSCRIPT of proceedings of 2/22/99 ( 202 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/24/1999) |

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| 02/24/1999 | 644 | TRANSCRIPT of proceedings of 2/23/99 ( 442 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/25/1999) |
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| 02/25/1999 | 647 | TRANSCRIPT of proceedings of 2/24/99 ( 706 pages) Prepared By: Fed Rptg (former empl) (Entered: 02/26/1999) |
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| 02/26/1999 | 649 | TRANSCRIPT of proceedings of 2/25/99 ( 945 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/01/1999) |
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| 03/01/1999 | 653 | TRANSCRIPT of proceedings of 2/26/99 ( 1064 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/01/1999) |
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| 03/02/1999 | 655 | TRANSCRIPT of proceedings of 3/1/99 ( 1313 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/02/1999) |
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| 03/03/1999 | 665 | TRANSCRIPT of Trial to Jury, Day 7 on 3/2/99 before Chief Judge Matsch ( 1314-1569 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/03/1999) |
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| 03/04/1999 | 668 | TRANSCRIPT of proceedings of 3/3/99 ( 1815 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/05/1999) |
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| 03/05/1999 | 669 | TRANSCRIPT of proceedings of 3/4/99 (2055 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/08/1999) |
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| 03/09/1999 | 681 | TRANSCRIPT of Trial to Jury, Day 10 before Judge Matsch (2056-2323 pages) Prepared By: Federal Rpt Svc. (gms) (Entered: 03/09/1999) |
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| 03/10/1999 | 689 | TRANSCRIPT of Trial to Jury, Day 11 on 3/9/99 before Judge Matsch (2324-2585 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/11/1999) |
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| 03/11/1999 | 695 | TRANSCRIPT of Trial to Jury, Day 12 before Judge Matsch ( 2586 through 2809 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/12/1999) |
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| 03/12/1999 | 698 | TRANSCRIPT of Trial to Jury, Day 13 before Judge Matsch (2810-3068 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/12/1999) |

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| 03/16/1999 | 702 | TRANSCRIPT of Trial to Jury, Day 14 before Judge Matsch (3069-3346 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/16/1999) |

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| 03/17/1999 | 710 | TRANSCRIPT of Trial to Jury, Day 15 before Judge Matsch (3347-3575 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/18/1999) |
| 03/18/1999 | 711 | TRANSCRIPT of Trial to Jury, Day 16 before Judge Matsch (3576-3849 pages) Prepared By: Federal Reporting Service (former empl) (Entered: 03/19/1999) |

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| 03/19/1999 | 712 | TRANSCRIPT of Trial to Jury, Day 17 before Judge Matsch on 3/18/99 (3850-4119 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/22/1999) |

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| 03/22/1999 | 718 | TRANSCRIPT of Trial to Jury, Day 18 on 3/19/99 before Judge Matsch. (4120-4238 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/23/1999) |

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| 03/23/1999 | 722 | TRANSCRIPT of Trial to Jury, Day 19 on 3/22/99 before Judge Matsch. ( 4239-4509 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/24/1999) |
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| 03/24/1999 | 724 | TRANSCRIPT of proceedings of Trial to Jury, day 20 on 3/23/99 before Judge Matsch ( 4510-4762 pages) Prepared By: Federal Rpt Svc (gms) (Entered: 03/24/1999) |
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| 03/25/1999 | 728 | TRANSCRIPT of proceedings of 3/24/99 ( 4914 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/25/1999) |
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| 03/26/1999 | 736 | TRANSCRIPT of proceedings of 3/25/99 ( 5032 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999) |
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| 03/29/1999 | 737 | TRANSCRIPT of proceedings of 3/26/99 (5057 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999) |
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| 03/30/1999 | 740 | TRANSCRIPT of proceedings of 3/29/99 (5276 pages) Prepared By: Fed Rptg (former empl) (Entered: 03/30/1999) |

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| 03/31/1999 | 742 | TRANSCRIPT of proceedings of 3/30/99 ( 5326 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/01/1999) |

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| 04/01/1999 | 744 | TRANSCRIPT of proceedings of 3/31/99 (5336 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/02/1999) |

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| 04/01/1999 | 747 | VERDICT for plaintiff James S. Stone, plaintiff USA against defendant Rockwell Intl Corp, defendant Boeing North Amer ; entry date: 4/2/99 (former empl) (Entered: 04/02/1999) |
| 04/02/1999 | 748 | TRANSCRIPT of proceedings of 4/1/99 ( 5346 pages) Prepared By: Fed Rptg (former empl) (Entered: 04/05/1999) |

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| 04/16/1999 | 751 | BRIEF FILED by defendant Rockwell Intl Corp, defendant Boeing North Amer re: entry of judgment on verdict [747-1] (former empl) (Entered: 04/19/1999) |
| 04/16/1999 | 752 | APPENDIX filed by defendant Rockwell Intl Corp, defendant Boeing North Amer re: brief [751-1] (former empl) (Entered: 04/19/1999) |

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| 05/04/1999 | 760 | RESPONSE by plaintiff James S. Stone, plaintiff USA to brief [751-1] (former empl) (Entered: 05/07/1999) |
| 05/04/1999 | 761 | RESPONSE by plaintiff James S. Stone to brief [751-1] (former empl) (Entered: 05/07/1999) |

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| 05/06/1999 | 764 | SUPPLEMENT by plaintiff USA response [760-1] (former empl) (Entered: 05/07/1999) |

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| 05/06/1999 | 766 | REPLY by defendant Rockwell Intl Corp, defendant Boeing North Amer response [761-1] (former empl) (Entered: 05/07/1999) |

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| 05/10/1999 | 770 | TRANSCRIPT of proceedings of 5/7/99 ( 20 pages) Prepared By: Federal Reporting Service (former empl) (Entered: 05/11/1999) |
| 05/13/1999 | 772 | ORDER by Chief Judge Richard P. Matsch Clk to enter final jgm under RRCP 54(b) awarding plf compensatory damages of $4,172,325 and pymt to US of civil penalty of $15,000 on Count 1 of Amended Complaint; jgm to enter for defs dismissing w/prejudice counts 2-5 of amended complaint; bill of costs due 10 day from entry of j gm (cc: all counsel) entry date: 5/13/99 (former empl) (Entered: 05/13/1999) |

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| 05/13/1999 | 773 | JUDGMENT: by Clerk James R. Manspeaker, approved by Chief Judge Matsch regarding [772-1] order; plf to recover from defs compensatory damages of $4,172,325 on Count One of Amended Complaint; defs to pay to US civil penalty of $15,000 on Count 1 of Amended Complaint; counts 2-5 of amended complaint dismissed w/prejudice; bill of costs to be submitted within 10 days (cc: all counsel); entry date: 5/13/99 (former empl) (Entered: 05/13/1999) |
| 05/26/1999 | 777 | AFFIDAVIT of William R. Gray motion for attorney fees and expenses [776-1] (former empl) Entered: 05/28/1999) |

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| 05/27/1999 | 776 | MOTION by plaintiff James S. Stone for attorney fees and expenses (former empl) (Entered: 05/28/1999) |
| 05/27/1999 | 778 | MOTION by defendant Rockwell Intl Corp to dismiss for lack of jurisd, or for hearing (former empl) (Entered: 05/28/1999) |

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| 05/27/1999 | 781 | SUPPLEMENT (submission of predecessor counsel's fees and costs) by plaintiff James S. Stone motion for attorney fees and expenses [776-1] (former empl) (Entered: 06/01/1999) |

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| 06/10/1999 | 786 | ORDER by Chief Judge Richard P. Matsch regarding [776-1] motion for attorney fees and expenses ruling reserved pending outcome of appeals (cc: all counsel); entry date: 6/10/99 (former empl) (Entered: 06/10/1999) |
| | | * * * |
| 06/10/1999 | 790 | ORDER by Chief Judge Richard P. Matsch granting motion for order correcting clerical error in jgm [775-1] (cc: all counsel) ; entry date: 6/10/99 (former empl) (Entered: 06/10/1999) |
| | | * * * |
| 06/10/1999 | 792 | AMENDMENT to judgment; plf shall have and recover from dfts $4,172,327.40 on count 1; dfts shall pay civil penalty of $15,000 on count 1, counts 2-5 of the amend comp dismissed w/prej; interest to accrue at 4.727% plus costs [773-1] (former empl) (Entered: 06/10/1999) |
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| 08/09/1999 | 794 | MOTION by defts Rockwell Intl Corp, Boeing North Amer for written order of ruling on renewed motion to dismiss plts claim for lack of jurisdiction or in the alternative for hearing on such motion (gms) (Entered: 08/09/1999) |

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| 08/09/1999 | 795 | NOTICE OF APPEAL by plaintiff James S. Stone in re: amended final judgment of 6/10/99 [792-1], order [789-1] of 6/10/99 and any other adverse orders or rulings that impacted the jury's erroneous damages verdict under False Claims Act; Notice of transcript order form due 8/19/99 ; Notice mailed to all counsel on 8/9/99 (gms) (Entered: 08/09/1999) |
| 08/09/1999 | N/A | $100.00 fee and $5.00 fee paid. Receipt No 208224. re: appeal [795-1] (gms) (Entered: 08/09/1999) |
| 08/09/1999 | 796 | NOTICE OF APPEAL by defts Rockwell Intl Corp, Boeing North Amer in re: judgment [773-1] of 5/13/99 as amended [792-1] on 6/10/99; Notice mailed to all counsel on 8/9/99 (gms) (Entered: 08/09/1999) |
| 08/09/1999 | N/A | $100.00 fee and $5.00 fee paid. Receipt No 208233. re: appeal [796-1] (gms) Entered: 08/09/1999) |
| 08/09/1999 | 797 | NOTICE OF APPEAL by plaintiff USA in re: amended judgment of 6/10/99 [792-1], order for entry of final judgment pursuant to Rule 54 (b) [772-1], order denying pltfs' motion for new trial re: damages [789-1] & order [791-1] denying pltf USA's motion to alter or amend judgment; Notice mailed to all counsel on 8/9/99 Fee Status: USA (gms) (Entered: 08/09/1999) |

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| 08/11/1999 | 799 | ORDER by Chief Judge Richard P. Matsch denying nunc pro tunc 6/10/99 motion to dismiss for lack of jurisd [778-1], denying motion for hearing [778-2] (cc: all counsel) ; entry date: 8/12/99 (former empl) Entered: 08/12/1999) |
| 08/12/1999 | 800 | RESPONSE by plaintiff James S. Stone to motion for written order of ruling on renewed motion to dismiss pltf's claim for lack of jurisdiction or in the alternative for hearing on such motion [794-1] (former empl) (Entered: 08/12/1999) |

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| 03/06/2002 | 809 | Copy of ORDER on Rehearing and Published Opinion from Court of Appeals [797-1], [796-1], [795-1] the petition for rehearing by the panel has been considered by the panel and it has been determined that rehearing is granted for the limited purpose of modifying the opinion and ordering a limited remand to the USDC; the limited remand to the USDC is for the purpose of making findings of fact and conclusions concerning the issue of disclosure prior to filing of this acting in accordance w/the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the USDC which the Judge deems necessary; upon completion, a suppl record will be transmitted to the USCA and the USCA will otherwise retain jurisdiction of this cause; upon receipt of the suppl record, final disposition of these appeals will be made (former empl) (Entered: 03/06/2002) |
| 04/04/2002 | 810 | MOTION by plaintiff James S. Stone for a finding on limited remand that Mr. Stone made the requisite disclosures to the Government prior to filing this action (lam) (Entered: 04/04/2002) |
| 04/04/2002 | 811 | Memorandum (BRIEF) by plaintiff James S. Stone in support of motion for a finding on limited remand [810-1] (lam) (Entered: 04/04/2002) |

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| 04/04/2002 | 812 | AFFIDAVIT of Maria T. Vullo in support of motion for a finding on limited remand [810-1] (lam) (Entered: 04/04/2002) |
| 04/04/2002 | 813 | Excerpts from the RECORD (Volume I of II) by plaintiff James S. Stone (placed in exhibit room) (lam) (Entered: 04/04/2002) |
| 04/04/2002 | 814 | Excerpts from the RECORD (Volume II of II) by plaintiff James S. Stone (placed in exhibit room) (lam) (Entered: 04/04/2002) |
| 04/24/2002 | 815 | RESPONSE by defendants to plaintiff Stone's motion for a finding that he made the requisite pre-filing disclosures to the government [810-1] (lam) (Entered: 04/25/2002) |
| 04/24/2002 | 816 | Additional RECORD on Remand by defendants (placed in exhibit room) (lam) (Entered: 04/25/2002) |
| 04/24/2002 | 817 | Additional Excerpts from Appellate RECORD by defendants (placed in exhibit room) (lam) (Entered: 04/25/2002) |

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| 05/07/2002 | 819 | MOTION by defendants for finding that plf Stone lacked direct & independent knowledge of info on which his spray irrigation allegations are based (lam) Modified on 05/22/2002 (Entered: 05/08/2002) |

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| 05/09/2002 | 820 | REPLY Memorandum by plaintiff James S. Stone to response to motion for a finding on limited remand [810-1] (lam) (Entered: 05/10/2002) |
| 05/22/2002 | 821 | RESPONSE by plaintiff James S. Stone to Rockwell's motion for finding regarding "Direct and Independent Knowledge" [819-1] (lam) (Entered: 05/22/2002) |
| 05/22/2002 | 822 | AFFIDAVIT of Maria T. Vullo in support of Stone's motion response [821-1], to Rockwell's motion for finding regarding "Direct and Independent Knowledge" [819-1] (lam) (Entered: 05/22/2002) |
| 06/06/2002 | 823 | REPLY Brief by defendants in support of motion for a finding that pla Stone lacked direct & independent knowledge of info on which his spray irrigation allegations are based [819-1] (lam) (Entered: 06/07/2002) |
| | | * * * |
| 12/02/2002 | 838 | TRANSCRIPT of Oral Argument on Limited Remand on 11/25/02 before Judge Matsch (pages: 1-54) Prepared By: Federal Reporting Service, Inc. (certified copy) (lam) (Entered: 01/21/2003) |

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| 12/17/2002 | 828 | ORDER by Judge Richard P. Matsch denying dfts' motion for finding that plf Stone lacked direct & independent of info on which his spray irrigation allegations are based [819-1] (cc: all counsel) ; entry date: 12/18/02 (lam) (Entered: 12/18/2002) |
| 12/17/2002 | 829 | Findings and Conclusions on Limited Remand (ORDER) by Judge Richard P. Matsch regarding [828-1] order, regarding [809-1] appeal. Order findings and conclusions to be forwarded to clerk of USCA together with papers filed subsequent to order of limited remand as a supplemental record on pending appeal (cc: all counsel) ; entry date: 12/23/02 (msn) (Entered: 12/23/2002) |
| 12/23/2002 | 830 | RECORD on appeal, consisting of supplemental volumes I, II, and III re: appeal [797-1], appeal [796-1], appeal [795-1] transmitted to the Court of Appeals. (msn) (Entered: 12/23/2002) |

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| 01/24/2003 | 840 | LETTER (Re: [795-1], [796-1], [797-1]) to USCA supplementing the preliminary record with a current copy of docket sheet, Plaintiff James S. Stone's Motion for Reconsideration and to Supplement the Record of 12/24/02 and Order of 1/21/03. (msn) (Entered: 01/24/2003) |

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| 04/05/2006 | 855 | ORDER of USCA re: [796] Notice of Appeal, [797] Notice of Appeal and [795] Notice of Appeal. Plaintiffs motion for an award of attorneys' fees is granted and the matter is remanded to district court for a determination of a reasonable fee award.(gms, ) (Entered: 04/07/2006) |
| 04/17/2006 | 856 | Letter from 10CCA regarding writ of certiorari was filed on 4/4/06 re [796] Notice of Appeal, [797] Notice of Appeal, [795] Notice of Appeal and assigned Supreme Court No. 05-1272. (Appeal No. 99-1351, 99-1352, 99-1353) (djs, ) (Entered: 04/19/2006) |
| 10/12/2006 | 857 | USCA LETTER re Appeals: The Clerk of the Supreme Court has notified us that a petition for writ of certiorari limited to Question 1 presented by the petition filed in the captioned cases was granted. (Supreme Court case no. 05-1272) (USCA case No's. 99-1351, 99-1352, 99-1353) (bjr2, ) (Entered: 10/13/2006) |

[filed 7-5-89]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Clerk's Stamp Illegible]

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

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COMPLAINT UNDER FALSE CLAIMS ACT

DEMAND FOR JURY TRIAL

FILED IN CAMERA AND UNDER SEAL

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## I. INTRODUCTION

1. This is an action to recover damages and civil penalties for the wrongful conduct and acts of defendant Rockwell International Corporation, ("Rockwell") including, but not limited to, the making of false or fraudulent claims, the making of false records or statements, the entering into of a conspiracy to defraud the United States Government, and the concealing of deficient deliveries of property, all to induce the United States Government to pay and continue to pay billions of dollars, in violation of the Federal False Claims Act, 31 U.S.C. §3729, et seq. (as amended, Pub.L. 99-

562, Oct. 27, 1986, 100 Stat. 3153, et seq.) hereinafter referred to as the "False Claims Act".

2. This is also an action for damages, including reinstatement of employment with other relief, brought by JAMES S. STONE (hereinafter "Stone"), a former employee of Rockwell, arising from the vindictive acts committed by said defendant against Stone in retaliation for the lawful acts of Stone, including the investigation of matters underlying the initiation of this action.

3. The False Claims Act, originally enacted in 1863 during the United States Civil War, was substantially amended by the False Claims Amendments Act of 1986, signed into law on October 27, 1986. The purpose of said amendments was to enhance the Government's ability to recover for losses sustained as a result of false or fraudulent means used against the United States Government to obtain payment or receipt of monies. After finding that false and fraudulent practices in federal programs and procurement were so pervasive, the Government determined that the False Claims Act, characterized as the primary tool for combating such practices in government contracting, was in need of modernization. Consequently the 1986 amendments were intended by Congress to create incentives to persons, who are aware of such false or fraudulent practices used against the Government, to disclose such information without fear of reprisal or Government inaction.

4. As amended, the False Claims Act expressly establishes civil liability for any person who commits certain acts, including knowingly presenting a false or fraudulent claim for payment or approval, knowingly making or using a false record or statement to obtain payment or approval of a false claim, conspiring to defraud the Government to induce payments, concealing or delivering a deficient amount of property used or to be used by the Government, and making or delivering a document certifying receipt of property without knowing that the information on the receipt is true. The liability that flows from said acts includes a civil penalty

of not less than $5000 and not more than $10,000 for each such act, plus three times the amount of the damages sustained by the Government because of the said act. The False Claims Act allows any person having knowledge of such acts to bring an action in the United States District Court for himself and for the United States Government, and to share in any recovery. The complaint is to be filed in camera and under seal for 60 days (without service on the defendant during the 60 day period) to enable to Government to determine whether it wishes to proceed with the action. At or about the time the Complaint is filed, a copy of the Complaint and written disclosure of substantially all material evidence and information the individual plaintiff possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedures.

5. Based on the aforesaid provisions, Stone seeks through this action to recover for the United States Government and for himself damages and civil penalties arising from acts of Rockwell perpetrated under, or associated with, contracts with the U.S. Department of Energy ("D.O.E.") and Department of Defense ("D.O.D."). The amount of damages, not including any civil penalties or treble damages provisions that may be assessed, sustained by the Government as a result of the defendant's acts, is in excess of $1 billion.

6. At about the time of the filing of this Complaint, plaintiff Stone shall file, in camera and under seal, proof of service of plaintiff's written disclosure of material evidence and information, along with a copy of this Complaint, on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.

## II. PARTIES

7. Stone is a citizen of the United States and a resident of the State of New Jersey. He is a Professional Engineer, registered as such in the States of Colorado, Wyoming, Idaho, Utah and New Mexico. Stone has

extensive experience and qualifications, covering more than 40 years, in engineering and defense contracting related matters. Attached hereto as Exhibit "A" is a copy of Stone's resume with attached documents evidencing his engineering achievements and commendations. Stone was employed by defendant Rockwell from November 1980 until March 1986 as an engineer, holding various titles including that of Lead Principal Engineer in the Utility Design Department, Facility Engineering Division, of Rockwell's Rocky Flats operations near Golden, Colorado.

8. On behalf of himself and the United States Government pursuant to 31 U.S.C. §3730, et seq., Stone brings this action against Rockwell by reason of the egregious violations by defendant of the False Claims Act. To the extent that this action may be based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, Stone is the "original source" of the information as that term is defined in 31 U.S.C. §3730(e) (4) (B) .

9. Defendant Rockwell is a Delaware corporation, engaged in the design and manufacture of military weapons and electronics equipment, space systems and rocket engines. Rockwell is one of the largest industrial companies in the United States of America with about $12 billion in sales and approximately $800 million in profits for 1988. Rockwell has operated the D.O.E. facility at Rocky Flats, Colorado ("Rocky Flats Plant") under contract with D.O.E. since about 1975. Rockwell's present contract with D.O.E., for a term of 5 years, would produce gross revenue of approximately $2.5 billion. (See attached Exhibit "B" which a true copy of a June 20, 1989 Rocky Mountain News "Special Report.") The Rocky Flats Plant is located approximately eight miles south of Boulder, Colorado, in Jefferson County, Colorado, with postal delivery at Golden, Colorado.

## III. JURISDICTION AND VENUE

10. This is a civil action arising under the laws of the United States to redress violations of 31 U.S.C. §3729, et seq., also known as the "False Claims Act". As such, this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and 31 U.S.C. §3732, which specifically confers jurisdiction on this Court for actions brought pursuant to §§3729 and 3730 of Title 31.

11. This Court also has jurisdiction pursuant to 28 U.S.C. §1332, in that there is diversity of citizenship as between Stone and Rockwell, and the amount in controversy exceeds $10,000, exclusive of interest and costs.

12. The Court has jurisdiction over Rockwell, pursuant to 31 U.S.C. §3732(a), as defendant committed wrongful acts and submitted false claims to the United States Government through its operations at the Rocky Flats Plant to obtain payment or approval by the United States Government.

13. Venue is proper in this District pursuant to 31 U.S.C. §3732(a) as Rockwell has transacted business in the District of Colorado and committed in this district the acts proscribed by 31 U.S.C. 3729, et seq.

## IV. FACTS

14. From at least as early as November 1980, and continuing thereafter, Rockwell has been legally required to comply with certain federal and state regulations, statues, laws, and agreements, including but not limited to:

(a) D.O.E. Orders including 5483.1, as superceded by 5483.1A, for Occupational Safety and Health Program for Government-Owned Contractor-Operated facilities, 6430.1, the D.O.E. General Design Criteria Manual, and 5480.2 ("D.O.E. Orders");

(b) Colorado Statutes including Hazardous Substances at C.R.S. 25-5-501, et seq., the Air Quality Control Program at C.R.S. §§25-7-101, et seq., Asbestos Control at C.R.S. 25-7-501, et seq., the Colorado Hazardous Waste Act at C.R.S. §§25-15-101, et seq., the Water

Quality Control Act at C.R.S. 25-8-201, et seq., Radiation Control at C.R.S. 25-11-101, et seq., Hazardous Substance Incidents at C.R.S. §29-22-101, et seq., and specific provisions defining prohibited acts and reporting requirements with respect to hazardous substances, for example C.R.S. §§ 25-5-503, 25-8-506 and 608, 25-15-308, 309, 310, 29-22-101 and 108, (such state statutes and any applicable regulations hereinafter referred to as the "Colorado Environmental Laws");

(c) Federal statutes including Occupational Safety and Health Act at 29 U.S.C. §651, et seq., the Atomic Energy Act of 1954, as amended, at 42 U.S.C. §2011, et seq, the Energy Reorganization Act of 1974 at 42 U.S.C. §5801, et seq., the Water Pollution Prevention and Control Act at 33 U.S.C. §1251, et seq., the Clean Air Act at 42 U.S.C. §7401, et seq., the Resource Conservation and Recovery Act at 42 U.S.C. §6901, et seq., the Safe Drinking Water Act at 42 U.S.C. §300f, et seq., and federal regulations applicable or enacted under the foregoing statutes including, but not limited to portions of Code of Federal Regulations, Titles 10, 29, 40, as well as Executive Order No. 12088, (hereinafter said federal statutes, regulations, and orders, are referred to as the "Federal Environmental and Safety Laws");

(d) Agreements including the June 4, 1986 Agreement in Principle between D.O.E., the Environmental Protection Agency ("EPA") and the State of Colorado, the July 30, 1986 Compliance Agreement between D.O.E., EPA, and the State of Colorado, and the January 8, 1975 Rockwell contract with D.O.E., renewals thereof, and later dated contracts including a Supplemental Agreement, effective January 1, 1989 ("the Rockwell-D.O.E. Contracts").

15. Rockwell, from about November 1980 and continuing thereafter, has committed and is presently

committing numerous and repeated violations of the above referenced D.O.E. Orders, Colorado Environmental Laws, Federal Environmental and Safety Laws, and agreements in connection with its operation of the Rocky Flats Plant. In order to induce the government to make payments or approvals, Rockwell committed numerous and continuing acts, in violation of the False Claims Act, 31 U.S.C. Section 3729(a), including the following:

(a) Knowingly presenting or causing to be presented to an officer or employee of the United States Government, false and fraudulent claims for payment or approval, including all requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-D.O.E. Contracts;

(b) Knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of the monies referred to in subpart (a), above;

(c) Conspiring with others to defraud the United States Government in order to obtain approval of a false or fraudulent claim, and thereby induce approvals and payments of the monies referred to in subpart (a) above;

(d) Having possession, custody, or control of property or money used, or to be used, by the United States Government and intending to defraud the Government, delivering or causing to be delivered to the Government less property in quality and quantity than that to which the Government was entitled;

(e) Making or delivering documents certifying receipt of property used, or to be used, by the United States Government and, with the intent to defraud the Government, making or delivering a receipt without completely knowing that the information on the receipt is true; or

(f) Knowingly making, using, or causing to be made or used, false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States Government.

16. Rockwell's contractual and legal obligations to be performed at the Rocky Flats Plant involved and presently involves two aspects of the handling and production of Government property which are of paramount importance to the national security of the United States: (1) the production and re-processing of detonation devices ("triggers") for nuclear warheads, using materials including plutonium and beryllium. (Said production and re-processing is referred to hereinafter as "Nuclear Trigger Operations".); (2) the receiving, processing, and shipment of materials, including hazardous wastes generated at Rocky Flats, as well as wastes received from other facilities, which have, in some instances, significant value as recoverable or recyclable Government property. (Said material processing is referred to hereinafter as "Waste and Recovery Operations".)

17. In performing the aforesaid Nuclear Trigger Operations and Waste and Recovery Operations, Rockwell knowingly caused the United States Government to receive less property, or property of a diminished value or usefulness, than that to which the United States Government was entitled; and further that Rockwell has concealed the relevant facts from the Government so as to continue to receive payments or approvals. (A more detailed statement of defendant's violations in this regard would require Stone to reveal information bearing upon matters of national security.)

18. From at least November 1980 to the present all monies and payments approved on application of Rockwell and/or received by Rockwell, including annual guaranteed fees, bonuses awarded due to Rockwell's performance, and reimbursement of the expenses and costs of operating the Rocky Flats Plant, in a total amount presently

unascertained, were so applied for and received by defendant with the knowledge and intention on defendant's part to defraud and deceive the United States Government, all in violation of the False Claims Act.

19. In committing the above alleged acts, Rockwell knowingly concealed and intended to conceal the true nature of its numerous and continuous violations of the D.O.E. Orders, Colorado Environmental Laws, Federal Environmental and Safety Laws, and agreements, as alleged above, with the intent to induce the Government to make and continue to make payments to Rockwell in connection with the operation of Rocky Flats Plant. Had the Government known the true nature and extent of Rockwell's violations, as well as its concealment of said violations, it would not have made payments and continued to make payments to Rockwell, as described herein.

20. At all relevant times, Rockwell conspired with others to conceal the true nature and extent of its violations, to ensure an uninterrupted stream of payments to Rockwell, to resist clean-up and monitoring actions of the Rocky Flats Plant by environmental and public health agencies, and to avoid enforcement litigation brought by governmental agencies or private citizens. Rockwell, and those it has conspired with, have committed acts in furtherance of said conspiracy in reckless disregard of the actual extent to which their actions have endangered the health and safety of the workers at Rocky Flats Plant and the nearly two million citizens living and working in the surrounding metropolitan area.

FIRST CLAIM FOR RELIEF

(Under False Claims Act)

21. Plaintiffs reallege and hereby incorporate by reference each and every allegation contained in paragraphs 1 through 20 of this Complaint.

22. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §3729, et seq.

(as amended, Pub.L. 99-562, Oct. 27, 1986, 100 Stat. 3153, et seq.).

23. By virtue of the acts alleged, Rockwell has obtained, and continues to obtain, payments and approvals from the United States Government in connection with its operation of the Rocky Flats Plant.

24. The United States Government, unaware of the nature and extent of the wrongful acts committed by Rockwell, made said payments and approvals, and may continue to do so, in reliance on false information, documents, reports, and statements made by Rockwell.

25. By reason of the aforesaid wrongful conduct and acts of Rockwell, the United States of America has been damaged in an amount estimated to be in excess of $1 billion. Plaintiffs will seek leave to amend the Complaint to reflect the true nature and amounts of said damages, which are continuing, when the same have been ascertained.

SECOND CLAIM FOR RELIEF

(Plaintiff James S. Stone's Claim for Discrimination and Harassment Under 31 U.S.C. §3730(h))

26. Stone realleges and hereby incorporates by reference each and every allegation contained in paragraphs 1 through 25 of this Complaint.

27. This is a claim for reinstatement, with back pay, special damages, litigation costs, and attorney's fees under the False Claims Act, 31 U.S.C. §3730(h).

28. As a result of his investigation underlying this action, as well as reports and complaints made by Stone consistent with the False Claims Act and the spirit thereof, Stone was, on about March 17, 1986, discharged by Rockwell from his employment as an engineer. Prior to his discharge, Stone was suspended and subjected to employment actions adversely affecting the terms and conditions of his employment.

29. Subsequent to Stone's discharge, Rockwell has subjected Stone to threats and harassment, including threats to institute a criminal prosecution against him.

30. The provisions of 31 U.S.C. §3730(h) afford Stone a private right of action, through an action brought in the appropriate District Court of the United States.

DEMAND FOR JURY

31. Plaintiffs demand a jury as to all issues in this action.

PRAYER

WHEREFORE, plaintiffs pray for judgment against defendant Rockwell International Corporation as follows:

A. On the First Claim for Relief:

1. This Court enter judgment against defendant Rockwell International Corporation in an amount equal to three (3) times the amount of damages the United States Government has sustained, plus a civil penalty of not less than $5000 and not more than $10,000 for each act in violation of 31 U.S.C. §3729;

2. Plaintiff James S. Stone be awarded the maximum award as a Qui Tam plaintiff under the False Claims Act;

3. This Court make findings for and an award of reasonable attorney's fees and all expenses and costs allowable under the False Claims Act; and

4. Such other and further relief as this Court deems just and proper.

B. On the Second Claim for Relief:

1. This Court order defendant Rockwell International Corporation to reinstate plaintiff James S. Stone in the Lead Principle Engineer Position, or its equivalent, with seniority and an award of back pay, interest on back pay, and lost benefits;

2. This Court issue an award of compensatory an/or special damages in order to make James S. Stone whole under the terms of 31 U.S.C. §3730(h);

3. This Court make findings for and an award of reasonable attorney's fees, litigation costs, and court costs pursuant to 31 U.S.C. §3730(h); and

4. Such other and further relief as this Court deems just and proper.

Dated: July 4th, 1989. ~~LEEVAN & ALLEY~~

By /s/ Hartley David Alley
Hartley David Alley
(Colo. Reg. No. 15389)
4251 Kipling Street, Suite 130
Wheat Ridge, Colorado 80033
(303) 431-8060

~~3345 Wilshire Blvd., Suite 1107~~
~~Los Angeles, California 90010~~
~~(213) 384-9192~~

Plaintiff's Address:

158 Huntington Drive
Vicentown, NJ 08088

Attorneys for Plaintiffs and
Specifically for Qui Tam and
Individual Plaintiff,
JAMES S. STONE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 92-CR-107

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

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**PLEA AGREEMENT AND STATEMENT OF FACTUAL BASIS**

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Plaintiff UNITED STATES OF AMERICA and Defendant ROCKWELL INTERNATIONAL CORPORATION ("ROCKWELL") submit this Plea Agreement and Statement of Factual Basis, in connection with criminal charges against ROCKWELL concerning its management and operation of the U.S. Department of Energy's Rocky Flats Plant ("Rocky Flats") near Denver, Colorado, as follows:

## I. PLEA AGREEMENT

The UNITED STATES and ROCKWELL have entered into a plea agreement, pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), whereby ROCKWELL will plead guilty to ten criminal charges, involving violations of the Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901 et seq., and the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and will pay total criminal fines of $18.5 million.

* * *

## III. STATEMENT OF FACTUAL BASIS

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish each of the following facts, as set forth in this entire Section III (including Counts 1 through 10), beyond a reasonable doubt:

At all material times, the U.S. Department of Energy ("DOE") was a department and agency of the United States Government responsible for making nuclear material for defense programs. The basic mission of DOE's defense activities was to produce nuclear material for weapons and naval fuel, and to manufacture nuclear weapons components. One of DOE's nuclear weapons facilities was Rocky Flats, located sixteen miles northwest of Denver, Colorado, in northern Jefferson County. The total site covers approximately 6,550 acres and includes more than 100 buildings and other structures.

Several creeks, including North Walnut Creek, South Walnut Creek and Woman Creek, cross Rocky Flats, flowing generally west to east. Three series of holding ponds known as the A, B and C series ponds have been built in North Walnut Creek, South Walnut Creek and Woman Creek, respectively. At all material times, "spray irrigation" was practiced at Rocky Flats to dispose of various wastewaters, contaminated groundwater and plant runoff, by spraying these waters from sprinkler systems at several "spray fields." A spray field known as the East Spray Field was used to dispose of water from the B-3 pond, which received treated wastewater, contaminated groundwater and plant runoff. The East Spray Field was comprised of the North Spray Field, located north of the B-series ponds (in the Walnut Creek drainage), and the South Spray Field, located primarily south of the East Access Road (in the Woman Creek drainage).

At all material times, ROCKWELL was a Delaware corporation headquartered in El Segundo, California. ROCKWELL managed and operated Rocky Flats on DOE's

behalf from June 30, 1975, until December 31, 1989, under several contracts.

The Resource Conservation and Recovery Act of 1976 ("RCRA"), Title 42, U.S.C. §§ 6901 et seq., as amended, prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. In order to treat, store or dispose of hazardous wastes at an interim status facility, RCRA requires compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations ("6 C.C.R. 1007-3"), Parts 265 and 270.

"Hazardous wastes" are those substances and materials listed or otherwise identified as hazardous wastes in 6 C.C.R. 1007-3, Part 261. "Mixed wastes" or "mixed hazardous wastes" are wastes which contain both radioactive wastes and non-radioactive hazardous wastes. "Low-level mixed wastes" are radioactive wastes containing transuranic material at or below 100 nanocuries per gram and also hazardous wastes.

On July 31, 1986, DOE, the United States Environmental Protection Agency ("EPA") and the Colorado Department of Health ("CDH") entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated, by EPA and CDH.

On May 1, 1987, DOE issued a "final interpretive rule" clarifying the applicability of RCRA to all DOE mixed wastes, including low-level mixed wastes. Under this rule, effective June 1, 1987, DOE conceded that the non-radioactive hazardous component of DOE mixed wastes was subject to RCRA regulation. The radioactive component is subject to Atomic Energy Act regulation.

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, et

seq., prohibits the discharge of any pollutants from a point source into waters of the United States except in accordance with the terms and conditions of a National Pollutant Discharge Elimination System ("NPDES") permit, issued pursuant to Title 33, United States Code, Section 1342. On November 26, 1984, the EPA issued an NPDES permit to Rocky Flats. The permit set specific limits on the kinds of discharges that Rocky Flats could make, the amounts of specific pollutants that could be discharged and where the discharges could be made. The permit also required Rocky Flats to monitor its discharges, and to report the results to EPA.

## RCRA CHARGES

The Information charges Defendant ROCKWELL with four felony violations of the Resource Conservation and Recovery Act, as follows:

### COUNT 1

Count 1 charges ROCKWELL with illegal storage of mixed hazardous wastes known as "pondcrete" and "saltcrete," in violation of RCRA interim status regulations.

A. Elements of the Offense.

The elements of this offense, pursuant to 42 U.S.C. § 6928(d)(2)(C), are that:

1. a person
2. knowingly stored
3. one or more hazardous wastes
4. in knowing violation of a material requirement of interim status regulations.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. Defendant ROCKWELL is a corporation and therefore, under RCRA, a "person." 42 U.S.C. § 6903(15).

2. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as Solar Evaporation Pond 207A, shaped in large rectangular blocks weighing approximately 1,500 to 1,800 pounds. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788.

3. Pondcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for cadmium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

4. "Saltcrete" is mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks weighing approximately 1,500 to 3,000 pounds. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

5. Saltcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for chromium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

6. ROCKWELL was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

7. Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3, § 265.31 required ROCKWELL to maintain and operate its interim status facilities in such a way as to "minimize the possibility of ... any unplanned sudden or non-sudden release of hazardous wastes or hazardous waste constituents to air, soil, or water which could threaten human health or the environment."

8. 6 C.C.R. 1007-3, § 265.173 required ROCKWELL to handle and store pondcrete and saltcrete containers in a manner that would prevent them from rupturing or leaking.

9. 6 C.C.R. 1007-3 § 265.15(c) required ROCKWELL to "remedy any deterioration or malfunction of equipment or structures ... on a schedule which ensure[d] that the problem [did] not lead to an environmental or human health

hazard. Where a hazard [was] imminent or ha[d] already occurred," ROCKWELL was required to take immediate remedial action.

10. 6 C.C.R. 1007-3, § 265.171 required ROCKWELL, upon discovering that pondcrete and saltcrete containers were not in good condition and had begun to leak, to transfer such wastes to containers in good condition, and to otherwise manage the wastes in compliance with interim status requirements.

11. ROCKWELL was aware and knew of these requirements.

12. On or about June 15-24, September 11-30 and December 7-16, 1987, February 15-24, May 6-25, July 18-27, September 14-23, 1988 and February 6-15, 1989, ROCKWELL knowingly stored approximately 12,000 pondcrete and saltcrete blocks on an outdoor pad known as the 750 Pad.

13. On or about June 6-15, August 1-10 and December 5-14, 1988 and June 1-10, 1989, ROCKWELL knowingly stored approximately 5,000 pondcrete and saltcrete blocks on another outdoor pad known as the 904 Pad.

14. During or about the same period, ROCKWELL knew that a substantial number of pondcrete and saltcrete blocks were not in fact solid. Pondcrete was often a sludge-like or semi-liquid material. Saltcrete was prone to expansion and crystallization.

15. ROCKWELL continued to manufacture pondcrete and saltcrete, and stored these hazardous wastes on the uncovered 750 and 904 Pads, in cardboard boxes with plastic liners, covered with tarps that were not waterproof.

16. ROCKWELL was aware that various pondcrete and saltcrete containers on the 750 and 904 Pads had deteriorated, and failed to remedy their condition.

17. ROCKWELL was aware that pondcrete and saltcrete constituents were leaching and being released from the pondcrete and saltcrete containers onto the 750 and 904 Pads, and failed to remedy this condition.

18. ROCKWELL was also aware that pondcrete and saltcrete constituents were running off the 750 and 904 Pads, and failed to correct this condition.

19. ROCKWELL failed to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

COUNTS 2, 3 AND 4

Counts 2, 3 and 4 charge ROCKWELL with illegal treatment and/or storage of mixed hazardous wastes, without a RCRA permit or interim status.

Elements of These Offenses.

The elements of these offenses, pursuant to 42 U.S.C. § 6928(d)(2)(A), are that:

1. a person
2. knowingly treated and/or stored
3. one or more hazardous wastes
4. without a permit or interim status.

COUNT 2

Count 2 charges ROCKWELL with illegal storage of mixed hazardous wastes on the 904 Pad, without a RCRA permit or interim status.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. Defendant ROCKWELL is a corporation and therefore, under RCRA, a "person." 42 U.S.C. § 6903(15).

2. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as Solar Evaporation Pond 207A, shaped in large rectangular blocks weighing approximately 1,500 to 1,800 pounds. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788.

3. Pondcrete is a low-level mixed waste exhibiting the

hazardous waste characteristic of EP toxicity for cadmium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

4. "Saltcrete" is a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks weighing approximately 1,500 to 3,000 pounds. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

5. Saltcrete is a low-level mixed waste exhibiting the hazardous waste characteristic of EP toxicity for chromium. It is therefore a hazardous waste, pursuant to 42 U.S.C. § 6903(5) and 6 C.C.R. 1007-3, Part 261.

6. Storage of saltcrete and pondcrete on the 904 Pad required a RCRA permit or interim status.

7. ROCKWELL was aware and knew of this requirement.

8. On or about October 5-9, November 16-20 and December 14-18, 1987, and January 18-22, February 22-26, March 21-25, April 18-22 and May 16-20, 1988, ROCKWELL knowingly stored approximately 5,000 pondcrete and saltcrete blocks on the 904 Pad.

9. The 904 Pad did not have a RCA permit or interim status to treat or store hazardous wastes.

***

CLEAN WATER CHARGES

The Information charges Defendant ROCKWELL with one felony violation of the Clean Water Act and five misdemeanor violations. The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts common to the CWA charges:

1. Defendant ROCKWELL is a corporation and therefore, under the CWA, a "person." 33 U.S.C. § 1362(5).

2. North Walnut Creek (including the A-series ponds), South Walnut Creek (including the B-series ponds) and

Woman Creek (including the C-series ponds) are tributaries to "waters of the United States," including Great Western Reservoir, Standley Lake and the South Platte River, and are therefore waters of the United States. 33 U.S.C. § 1362(7).

3. At all material times, Rocky Flats was an industrial facility which discharged to waters of the United States, and was required to have an NPDES permit concerning its operations.

4. On November 26, 1984, EPA issued an NPDES permit to Rocky Flats, pursuant to 33 U.S.C. § 1342. This permit established various conditions and limitations implementing the CWA, including 33 U.S.C. §§ 1311 and 1317.

COUNT 5

Count 5 charges Defendant ROCKWELL with negligently violating conditions and limitations in Rocky Flats' NPDES permit by discharging and releasing non-sanitary industrial wastes (including toxic and hazardous substances) to Rocky Flats' sewage treatment plant.

A. Elements of the Offense.

The elements of this offense, pursuant to 33 U.S.C. § 1319(c)(1)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984,

which was issued pursuant to 33 U.S.C. § 1342 and established conditions and limitations implementing §§ 1311 and 1317.

3. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 1 (Change in Discharge) required that all discharges authorized by the permit be consistent with its terms and conditions. ROCKWELL was required to report to the EPA all new, different or increased discharges of pollutants. Any new, different or increased discharge of pollutants not authorized by the permit violated the permit.

4. The NPDES permit, Part III (Other Requirements, Management Practices Plan), required ROCKWELL to maintain, implement and follow a Management Practices Plan to prevent or minimize the potential for releasing significant amounts of toxic or hazardous substances from Rocky Flats to waters of the United States.

5. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 3 (Facilities Operation), required ROCKWELL to "at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities installed or used [at Rocky Flats] to achieve compliance with the terms and conditions of [the] permit."

6. ROCKWELL was aware and knew of these requirements.

7. Rocky Flats' sewage treatment plant (consisting primarily of Building 995) was intended to receive and treat only sanitary waste. It was also allowed to receive uncontaminated cooling tower blowdown and steam condensate. The sewage treatment plant was not designed to receive and treat industrial or hazardous wastes, and did not have a RCRA or other permit to do so.

8. On or about August 10-19 and November 12-21, 1987, and March 7-16, April 11-20, May 9-18 and November 9-18, 1988, ROCKWELL negligently discharged and released non-sanitary industrial wastes (including toxic and

hazardous substances) to Rocky Flats' sewage treatment plant, including ignitable and corrosive hazardous wastes (D001, D002), beryllium dust (P015), wastewater treatment sludges (F006, F019), spent halogenated and non-halogenated solvents (F001, F002, F003, F004 and F005), acetone (U022), methylene chloride (U080) and 2-butanone (U002), as well as various metal-bearing waste streams described by ROCKWELL in its RCRA Part A permit applications, on the basis of its process knowledge, as "EP toxic" for silver (D011), cadmium (D006), chromium (D007) and mercury (D009).

9. ROCKWELL negligently failed to report to EPA the discharge and release of these pollutants, which were not authorized by Rocky Flats' NPDES permit.

10. ROCKWELL's Management Practices Plan negligently failed to prevent or minimize the release of toxic and hazardous substances to the sewage treatment plant.

11. ROCKWELL negligently failed to maintain and operate as efficiently as possible all treatment or control facilities necessary to achieve compliance with Rocky Flats' NPDES permit. There was no regular program to monitor wastes being sent to the sewage treatment plant, and only limited monitoring at the treatment plant itself.

12. Rocky Flats' sewage treatment plant was not designed to treat industrial or hazardous wastes, and the unreported discharge of industrial wastes to the sewage treatment plant impaired the plant's performance.

13. Effluent from the sewage treatment plant was generally discharged to the B-3 pond, where it was either discharged through Outfall No. 001 to the B-4 and B-5 ponds or spray irrigated.

COUNTS 6, 7 AND 8

Counts 6, 7 and 8 charge Defendant ROCKWELL with negligently violating Rocky Flats' NPDES permit by discharging water from the B-3 pond which exceeded the permit limits for five-day Biological Oxygen Demand ("BOD-5") and/or fecal coliform, in March, April and May

1988.

A. Elements of These Offenses.

The elements of these offenses, pursuant to 33 U.S.C. § 1319(c)(1)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts common to Counts 6, 7 and 8:

1. ROCKWELL is a person.

2. BOD-5 and fecal coliform limits are used to determine the adequacy of wastewater treatment. Measurements of BOD-5 and fecal coliform above a determined level indicate that a wastewater has not been treated to the desired level.

3. At all material times, Rocky Flats' NPDES permit contained an effluent limitation implementing 33 U.S.C. § 1311 which required that discharges from the B-3 pond (Outfall No. 001), on a thirty-day average basis, not exceed a BOD-5 limit of ten milligrams per liter.

4. At all material times, Rocky Flats' NPDES permit also required that discharges from the B-3 pond (Outfall No. 001), on a thirty-day average basis, not exceed a fecal coliform limit of 200 organisms per 100 milliliters.

5. ROCKWELL was aware and knew of these requirements.

6. The discharge of industrial wastes (including toxic and hazardous substances) to Rocky Flats' sewage treatment plant and ROCKWELL's inadequate disposal of accumulated sewage sludge impaired the plant's ability to meet the terms and conditions of Rocky Flats' NPDES

permit.

7. ROCKWELL was aware and knew of these conditions.

COUNT 6

Count 6 charges that ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit in March 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During March 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about March 1, 15 and 30, 1988, ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was 21.3 milligrams per liter, which exceeded the permit limit.

COUNT 7

Count 7 charges that ROCKWELL negligently violated the BOD-5 and fecal coliform limits in Rocky Flats' NPDES permit in April 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During April 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about April 1, 8, 12, 16, 20 and 30, 1988, ROCKWELL negligently violated the BOD-5 and fecal coliform limits in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was more than 27 milligrams per liter, which exceeded the permit limit.

4. The thirty-day average for fecal coliform was 312

organisms per 100 milliliters, which also exceeded the permit limit.

COUNT 8

Count 8 charges that ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit in May 1988.

Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. During May 1988, ROCKWELL discharged water from the B-3 pond (Outfall No. 001).

2. On or about May 1, 15 and 30, 1988, ROCKWELL negligently violated the BOD-5 limit in Rocky Flats' NPDES permit.

3. The thirty-day average for BOD-5 was more than 11 milligrams per liter, which exceeded the permit limit.

COUNT 9

Count 9 charges Defendant ROCKWELL with knowingly violating conditions and limitations in Rocky Flats' NPDES permit, by "spray irrigating" water from Pond B-3 contrary to good engineering practices and in such a manner as to bypass Rocky Flats facilities which were necessary to maintain compliance with the plant's NPDES permit.

A. Elements of the Offense.

The elements of this offense, pursuant to 33 U.S.C. § 1319(c)(2)(A), are that:

1. a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. knowingly violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984.

3. The NPDES permit, Part I, Section A, Paragraph 1 (Effluent Limitations – Outfall No. 001, Discharge from Pond B-3) required ROCKWELL to spray irrigate in "accordance with good engineering practices."

4. The NPDES permit, Part II, Section A (Management Requirements), Paragraph 5 (Bypassing) and Part III (Other Requirements, Bypass of Treatment Facilities) prohibited ROCKWELL from bypassing any Rocky Flats facilities necessary to maintain compliance with the permit's terms and conditions.

5. ROCKWELL was aware and knew of these requirements.

6. At all material times, ROCKWELL practiced spray irrigation to dispose of water from the B-3 pond, which received treated effluent from the sewage treatment plant, contaminated groundwater and plant runoff. This water was sprayed at the East Spray Field.

7. On or about May 18, June 19, July 9, 10 and 22, August 4, November 15 and December 4, 8, 9 and 25, 1987, January 4, March 2, April 22, May 19-20, November 14 and December 2, 9, 15 and 27, 1988, and January 7, February 1, 2, 8, 13, 20 and 25, March 4, 9, 28 and 30, April 11 and 21, May 10, 25 and 31 and June 5, 15 and 23, 1989, ROCKWELL knowingly operated the East Spray Field in violation of good engineering practices, in that ROCKWELL (a) spray irrigated more effluent from Pond B-3 than the East Spray Field had capacity to properly dispose of by evaporation and/or infiltration; (b) spray irrigated during times when the spray fields were saturated, during sub-freezing temperatures, at night and when snow and ice were on the

ground; and (c) spray irrigated over and adjacent to the "East Trenches."

8. The East Trenches are a group of old waste disposal sites at Rocky Flats located east of the main plant, on the north and south sides of the East Access Road. The disposal sites contain approximately 275,000 pounds of uranium-contaminated sewage sludge, 300 flattened uranium-contaminated drums, various plutonium-contaminated debris and volatile organic compounds, including 1-1-dichloroethane, carbon tetrachloride and trichloroethane.

9 ROCKWELL knowingly violated good engineering practices by irrigating over the East Trenches until April 1987, and thereafter irrigating adjacent to the East Trenches, which sent substantial volumes of water into the waste disposal area.

10. ROCKWELL was aware and otherwise knew that its spray irrigation practices caused substantial runoff into the North Walnut Creek drainage (including the A-4 pond), the South Walnut Creek drainage (including the B-4 and B-5 ponds) and the Woman Creek drainage (including the C-2 pond).

11. By these practices, ROCKWELL bypassed Rocky Flats facilities necessary to maintain compliance with the plant's NPDES permit, in that effluent from Pond B-3, by means of spray irrigation and runoff into the other ponds and drainages, bypassed the permitted discharge point from Pond B-3 to the B-4 pond (Outfall No. 001), and was not controlled or monitored at that location.

12. Spray irrigation was practiced in part to avoid violations at Outfall No. 001 which would have occurred if Outfall No. 001 had not been bypassed.

COUNT 10

Count 10 charges that ROCKWELL negligently violated Rocky Flats' NPDES permit in February and March 1989, by allowing a chromic acid spill to reach Rocky Flats' sewage treatment plant and the B-3 pond, spray irrigating the chrome-contaminated wastewater at the Easy

Spray Field and bypassing facilities necessary to maintain compliance with Rocky Flats' NPDES permit.

The offense charged in Count 10, pursuant to 33 U.S.C. § 1319(c)(1)(A), includes the following elements:

A. Elements of the Offense.

1. That a person
2. operating under an NPDES permit issued pursuant to 33 U.S.C. § 1342 and implementing §§ 1311 and 1317,
3. negligently violated a condition or limitation in such permit implementing such sections.

B. Factual Basis.

The UNITED STATES and ROCKWELL agree that the UNITED STATES' evidence at trial would establish the following facts:

1. ROCKWELL is a person.

2. At all material times, ROCKWELL operated Rocky Flats under an NPDES permit dated November 26, 1984, which was issued pursuant to 33 U.S.C. § 1342 and established conditions and limitations implementing §§ 1311 and 1317.

3. Rocky Flats' NPDES permit required ROCKWELL to maintain, implement and follow a Management Practices Plan which would prevent or minimize the potential release of toxic and hazardous substances to waters of the United States. ROCKWELL was also required to maintain all of Rocky Flats' treatment and control facilities in good working order and to operate them at all times as efficiently as possible.

4. Rocky Flats' NPDES permit required ROCKWELL to spray irrigate in accordance with good engineering practices, and prohibited ROCKWELL from bypassing any facilities necessary to maintain compliance with the permit's terms and conditions.

5. ROCKWELL was aware and knew of these requirements.

6. On February 23-24, 1989, ROCKWELL negligently failed to prevent the discharge of significant amounts of chromic acid from Building 444 to the sewage treatment plant and the B-3 pond.

7. Chromic acid (containing hexavalent chrome) is a toxic and hazardous substance.

8. ROCKWELL negligently failed to maintain and implement adequate spill detection, control and containment procedures to prevent the chromic acid spill from entering the environment, in that ROCKWELL (a) failed to maintain spill detection and monitoring capability either upstream or at the sewage treatment plant; (b) failed to maintain spill containment capacity in the B-1 and B-2 ponds (or elsewhere), contrary to ROCKWELL's Management Practices Plan; and (c) failed to terminate spray irrigation of the contaminated wastewater from the B-3 pond.

9. On or about February 24-28 and March 2-3, 1989, ROCKWELL negligently spray irrigated the chrome-contaminated wastewater at the East Spray Field, contrary to good engineering practices. In running off the spray fields to the A-4, B-4, B-5 and C-2 ponds, the contaminated wastewater bypassed Outfall No. 001 at Pond B-3 and violated the permit.

Respectfully submitted this March 26, 1992.

U.S. DEPARTMENT OF JUSTICE

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ATTORNEYS FOR PLAINTIFF UNITED STATES OF AMERICA

# PLEA AGREEMENT

THIS PLEA AGREEMENT, dated March 26, 1992, is entered into by the United States Department of Justice and Rockwell International Corporation ("Rockwell"), concerning the criminal investigation at the Rocky Flats Nuclear Weapons Plant ("Rocky Flats") near Denver, Colorado, as follows:

1. Pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), Rockwell will plead guilty to ten criminal charges involving violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., as set forth in the attached charging document. In return, the United States will not bring other environmental criminal charges (or environmentally-related conspiracy, fraud or false statement criminal charges) against Rockwell or its present or former officers, directors or employees, as to all such environmental and environmentally-related matters concerning Rocky Flats which are presently known to the Department of Justice on the date of this agreement.

2. The charges specific in Paragraph 1 may be brought by indictment or information, and, in the event they are brought by information, Rockwell will waive indictment. All pleadings (including sentencing memoranda) will be consistent with such charges and this agreement.

3. The United States and Rockwell agree, pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C), that a specific sentence is the appropriate disposition of this case. In connection with the disposition outlined in Paragraph 1, Rockwell, at the time of sentencing, will pay total criminal fines of $18.5 million (except as provided in Paragraph 4). All monies paid by Rockwell in disposing of the charges outlined in Paragraph 1 shall be considered and otherwise characterized as criminal fines.

4. Contemporaneous with this agreement, Rockwell has also entered into a settlement with the State of Colorado (the "State Settlement"), and will pay the State of Colorado

$2 million. The United States has considered the State Settlement as a significant and material factor in entering this agreement, in terms of the total dollars being paid. The United States agrees that $2 million of the $18.5 million in criminal fines will be remitted if Rockwell, at the time of sentencing, establishes that it has paid $2 million to the State, pursuant to the State Settlement.

5. In connection with this disposition, the United States agrees that, as to all environmental matters at Rocky Flats which are presently known to the Department of Justice or the Environmental Protection Agency ("EPA") on the date of this agreement, the United States covenants not to sue or take administrative action against Rockwell for civil damages, penalties or other monetary relief based upon alleged violations of RCRA, the CWA, § 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603, the Clean Air Act, 42 U.S.C. §§ 7401 et seq., or the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.

This covenant does not encompass (or preclude) (a) claims for recovery of response costs, natural resource damages or injunctive relief brought pursuant to RCRA, CERCLA or other authority, or for civil or administrative penalties arising in connection with such relief or a consent decree or administrative order mandating such relief; (b) the ongoing civil or administrative investigation of possible violations of 40 C.F.R. Part 761 concerning polychlorinated biphenyls ("PCBs") at Rocky Flats, including, without limitation, Building 707; or (c) the issues raised in United States of America, ex rel., and James S. Stone v. Rockwell International Corporation, Civil Action No. 89-C-1154 (D. Colo.) ("Stone"). After an independent review, the Department of Justice-Civil Division has determined to file a notice in Stone declining to intervene.

6. Rockwell will not seek to recover, pursuant to indemnification provisions in Rockwell's contracts with the U.S. Department of Energy ("DOE") or otherwise, and will

not recover from DOE, the criminal fines (or any portion thereof) paid by Rockwell in connection with this disposition, as outlined in Paragraphs 3 and 4, whether paid as criminal fines or as payment to the State of Colorado, pursuant to the State Settlement.

7. Except as provided in Paragraph 8, Rockwell will not seek to recover, pursuant to indemnification provisions in Rockwell's contracts with DOE or otherwise, and will not recover from DOE, the attorneys' fees and costs incurred by Rockwell in defending or preparing to defend the Rocky Flats criminal investigation and prosecution (including this disposition and sentencing), concerning the following subjects: (a) the manufacture, storage, treatment, disposal or other management of pondcrete and saltcrete; (b) the use of the 207 solar ponds to receive, treat or store hazardous or mixed wastes; (c) the manufacture, storage, treatment or other management of vacuum filter sludge; (d) the operation and management of the sewage treatment plant (including its influent and effluent); (e) spray irrigation; (f) Rocky Flats' violation of the biological oxygen demand and fecal coliform limits in its NPDES permit; and/or (g) the cromic acid spill in February-March 1989.

8. As authorized by 41 U.S.C. § 256(c) and 10 C.F.R. § 970.3102-20(c), Rockwell may seek to recover from DOE (and subject to DOE's review and approval in accordance with the relevant contract(s) and applicable law and regulations): (a) attorneys' fees and costs incurred by Rockwell (on behalf of the corporation) prior to January 1, 1990 (but not thereafter); (b) attorneys' fees and costs incurred by Rockwell in providing legal representation to past and present Rockwell employees; and (c) costs concerning a computer system which is also used in Rocky Flats-related civil litigation.

9. Except as provided in Paragraphs 6, 7 and 8, the effect and application of various indemnification provisions in Rockwell's contracts with DOE are matters for DOE's determination. While the Department of Justice will not, on

its own, initiate action to invalidate such provisions to the extent they are interpreted by DOE to allow indemnification for environmental or related tort liability to third-parties, the Department of Justice may represent DOE in any litigation concerning these matters. For purposes of the indemnification provisions in Rockwell's contracts with DOE, nothing in this agreement shall be construed as an admission by Rockwell, or a determination by the Department of Justice, of "willful misconduct or lack of good faith" by Rockwell's "managerial personnel," as such terms are used or defined in Contract DE-AC04-76DP03533, but DOE shall be informed of this disposition and shall not be precluded, concerning these matters, from considering the same.

10. In connection with this disposition, the Department of Justice will make the following statements at an appropriate time:

a. Based on information presently known to the Department of Justice, the conduct to which Rockwell has pleaded guilty did not and has not resulted in substantial physiological harm, or the imminent threat of substantial physiological harm, to members of the public residing and working outside Rocky Flats' boundaries.

b. The investigation has not revealed that hazardous or mixed wastes were burned in the Building 771 incinerator during the period October 1988 to January 1989, or, at any time, in the Building 776 fluidized bed incinerator.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[FILED]
[UNITED STATES DISTRICT COURT]
[DENVER COLORADO]
[DEC 15 1992]
[JAMES R. MANSPEAKER]
[CLERK]

Case No. 89-C-1154

UNITED STATES OF AMERICA
*ex rel.* James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

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**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION**

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Defendant Rockwell International Corporation ("Rockwell") respectfully submits this brief in support of its Motion To Dismiss Plaintiff's Complaint Under Rule 12(b)(l) for Lack of Subject Matter Jurisdiction ("Motion").

## *I. FACTS*

In July 1989, relator James S. Stone ("Stone") filed a complaint against Rockwell under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33, as amended in 1986 (the "FCA").[1]

In his complaint Stone alleged that Rockwell violated the FCA by concealing from the United States Government its violations of various environmental, health and safety statutes and regulations (the "ES&H provisions") in its operations at the Rocky Flats Plant, and by falsely representing to the Government that it was in compliance with those provisions. (Complaint ¶¶ 14, 15, 19 & 24.) Stone further alleged that Rockwell concealed its ES&H violations from the Government, and made false statements to the Government concerning its compliance with ES&H provisions, to obtain payments from the Government in connection with Rockwell's operation of the Rocky Flats Plant. (*Id.* ¶¶ 19 & 24.) Rockwell believes Stone has no facts to support these allegations of false statements and

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[1] Rockwell contends that Stone's claims are governed by the pre-amendment, rather than the post-amendment, FCA—a contention supported by the only appellate case on point. *See United States v. Murphy*, 937 F.2d 1032, 1036-38 (6th Cir. 1991). Under the pre-amendment FCA, Stone's claims are jurisdictionally barred if they are "based upon evidence or information in the possession of the United States ... at the time such suit was brought." *See* 31 U.S.C. § 3730(b)(4) (1985), *amended by* 31 U.S.C. § 3730(e)(4) (1986). Stone admits that his claims are based upon information in the Government's possession at the time this suit was brought. *See* Attachments A-3 & A-4 (Interrogatory No. 1(k) and Stone's response thereto). Stone's claims are therefore barred under the jurisdictional provisions of the pre-amendment FCA. Rockwell assumes *arguendo* solely for purposes of this motion that Stone's claims are governed by the post-amendment Act.

concealments, and has accordingly filed a motion under Fed. R. Civ. P. 56 seeking judgment in its favor as a matter of law. For purposes of the present motion only, however, Rockwell assumes *arguendo* that all of the allegations set forth above are true.

Stone also alleged in his complaint that he was the "original source" of the allegations set forth therein. (Complaint ¶ 8.) Stone made this allegation in accordance with 31 U.S.C. § 3730(e)(4), which provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations ... in a criminal ... hearing ... or from the news media, unless ... the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who [*inter alia*] has direct and independent knowledge of the information on which the allegations are based ....

Set forth below are undisputed facts bearing on the issues raised by these two elements of section 3730(e)(4), *i.e.*, (1) whether this action is based upon the public disclosure of allegations in a criminal hearing or in the news media, and (2) whether Stone had direct and independent knowledge of the information on which the allegations are based.

*A. Public Disclosure of Allegations*

On June 6, 1989—one month before Stone commenced this action—the Federal Bureau of Investigation filed an Application and Affidavit for Search Warrant (the "Search Warrant Affidavit") in *In re Search of Rocky Flats Plant*, Magistrate's Case No. 89-730M (D. Colo.). The Search Warrant Affidavit, the pertinent pages of which are attached to Rockwell's Motion as Attachment A-1, stated that it was based upon an investigation conducted by the FBI, the Environmental Protection Agency ("EPA"), the

Department of Justice and the U.S. Attorney's Office for the District of Colorado. (Attachment A-1, ¶ 1.4.) The affidavit alleged there was probable cause to believe that Rockwell:

- "knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations, and concealed Rocky Flats' 'serious contamination'" (*id.* ¶ 2.10);
- "falsely certified in November 1985 that Rocky Flats was 'in compliance with all applicable [RCRA] groundwater monitoring [requirements]'" (*id.* ¶ 2.11);
- "provided DOE with erroneous and incomplete reports on environmental, health and safety matters" (*id.* ¶ 2.12);
- "failed to report two discharges from Rocky Flats in November 1988 into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies," and "failed to disclose at least three illegal discharges in December 1988 ... from the plant's sewage treatment facility" (*id.* ¶ 2.13);
- "made false statements to or concealed material facts from the EPA concerning discharges from Rocky Flats to 'navigable waters'" (*id.* ¶ 9.25); and
- "certified that the solar ponds at Rocky Flats ... were 'in compliance with all applicable groundwater monitoring and financial requirements stated or referred to in [RCRA],'" when "the certifications were completely at odds with information known to Rocky Flats officials" (*id.* ¶ 10.15).

The affidavit further alleged that "[t]here is probable cause to believe that ... false statements and concealment of material facts have occurred, in violation of ... 18 U.S.C. § 1001." (*Id.* ¶ 5.55.) That statute imposes criminal liability upon a person who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up ... a material

fact, or makes any false, fictitious or fraudulent statements or representations."

On June 9, 1989, in response to motions filed by the Government and the *Rocky Mountain News*, Magistrate Judge Hilbert Schauer issued an order unsealing the Search Warrant Affidavit. (*See* Attachment A-2.) There followed numerous news reports concerning the allegations of false statements and concealments by Rockwell. For example, the June 10, 1989 *Denver Post* stated:

> Investigators ... say Rocky Flats officials ... falsified documents to hide environmental crimes.
>
> * * *
>
> Another group of allegations concerns false statements and concealment to "keep the public from knowing just how really bad the site is," said the affidavit ....
>
> 'There is probable cause to believe that Rockwell and (Energy Department) officials have knowingly and falsely stated Rocky Flats compliance with environmental laws and regulations, and concealed Rocky Flats' serious contamination," the affidavit said.
>
> Also, the affidavit said, "false statements and concealment of material facts have occurred" at the plant.
>
> The investigation also is looking into whether performance bonuses were paid to Rockwell based on falsified evaluations.

(Attachment A-10, p. 12.) The June 10, 1992 *Rocky Mountain News* and *Boulder Daily Camera* similarly described the affidavit's allegations of false statements and concealments by Rockwell. (*Id.* pp. 13-17.) And the June 21-27, 1989 *Westword* stated:

> A joint EPA and CDH inspection in 1983 established that Rockwell ... had been storing and

> disposing hazardous waste without the required permit since at least 1981. Plant managers had insisted a permit wasn't necessary because the waste fell below the minimum amount requiring a permit, and none of it was stored longer than ninety days. The inspection revealed both claims were false—and Rockwell knew it.
>
> * * *
>
> As early as 1985, regulators knew the plant was illegally fouling the groundwater, and that Rockwell had knowingly misrepresented its protection measures.

(*Id.* p. 18) There were also numerous news reports on June 7-10, 1989 concerning the FBI's investigation into, *inter alia*, alleged false statements and concealments by Rockwell, including articles in the *Boulder Daily Camera*, *The Denver Post*, *The New York Times*, the *Wall Street Journal*, the *Los Angeles Times*, the *Arvarda Sentinal*, the *Westminster Sentinal*, the *Broomfield Enterprise* and the *Austin (Texas) American-Statesman*. (*See id.* pp. 1-11.)

***B. Direct and Independent Knowledge of Information***

On July 5, 1989—one month after the public disclosure in the Search Warrant Affidavit and the news media of alleged false statements and concealments by Rockwell—Stone filed his FCA complaint alleging false statements and concealments by Rockwell. Stone's complaint did not specify a single instance in which Rockwell had engaged in such conduct. Instead, it alleged generally—as had the Search Warrant Affidavit and news media—that Rockwell "knowingly concealed ... its numerous and continuous violations" of the ES&H provisions from the Government, and that the Government, "unaware of the nature and extent of the wrongful acts committed by Rockwell, made ... payments ... in reliance on false ... statements made by Rockwell." (Complaint ¶¶ 19 & 24.)

In December 1991 Rockwell submitted interrogatories to Stone concerning his allegation that he was the "original source" of these allegations (*id.* ¶ 8), *i.e.*, that he had "direct and independent knowledge" of false statements and concealments by Rockwell. In response to Rockwell's request that Stone present his evidence of such false statements or concealments (*see* Attachment A-5, Interrogatory Nos. 1(*l*)-(o)), Stone stated:

> Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other submissions by Rockwell, reflect concealments of those violations.

(Attachment A-8, p. 2.) Stone then added the following statement purporting to be responsive to Rockwell's request for evidence supporting his allegations of false statements and concealments by Rockwell:

> [U]nder the terms of the contracts between Rockwell and the U.S. Government [the "Agreements"] ... Rockwell was required to comply with ... statutes and regulations governing the environment, health and safety. Furthermore, Modification M111 to the base contract ... requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government ... when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

(*Id.*) Stone did not have a copy of the Agreements, or of Modification M111 to those Agreements, when he commenced this action. Moreover, Stone admitted in his deposition that he had no personal knowledge whatever concerning Rockwell's requests for funds from the Government:

> Q. Do you have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government?
>
> A. No.
>
> Q. You don't have any paperwork that Rockwell might have submitted or that the government reviewed or anything like that?
>
> A. No.

(Attachment A-9 p. 123, ll. 14-22.) Stone also admitted in his deposition that, even assuming Modification M111 required Rockwell to certify its compliance with ES&H provisions, he was not aware of a single document in which Rockwell falsely certified that it was in compliance:

> Q. Can you point me, Mr. Stone, or can you produce to me or show me where to find any specific documents where Rockwell falsely certified that it was in compliance when it was not?
>
> A. No.

(*Id.* p. 113, II. 2-7.) In fact, neither Modification M111 nor any other provision of the Agreements required Rockwell to certify that it was in compliance with the ES&H provisions, and Rockwell did not so certify. (*See* Attachment A-11 ¶ 4.)

## II. ARGUMENT

Under section 3730(e)(4) of the False Claims Act, this Court lacks jurisdiction over Stone's *qui tam* action if:

(1) the action is "based upon the public disclosure of allegations in ... a criminal hearing ... or from the news media"; and (2) Stone did not have "direct and independent knowledge of the information on which the allegations are based." The satisfaction of section 3730(e)(4) is an issue of subject matter jurisdiction. *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 551 (10th Cir. 1992). A number of well-established principles govern the Court's resolution of this issue.

First, since federal courts are courts of limited jurisdiction, this Court must presume that no jurisdiction exists absent a showing of proof by Stone. *Id.*; *see also Penteco Corp. Ltd. Partnership 1985A v. Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (party invoking federal jurisdiction has burden of proof).

Second, the Court, and not a jury, must decide whether subject matter jurisdiction exists. *See, e.g., Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981) ("Jurisdictional issues are for the court—not a jury—to decide, whether they hinge on legal or factual determinations."); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 234-35 (2d ed. 1990).

Third, the Court must decide the issue of subject matter jurisdiction before it addresses the merits of Stone's claims. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992) ("We must examine whether any of [the *qui tam* plaintiffs] claims are blocked by the jurisdictional bar of section 3730(e)(4) *before* we can consider any other question.") (emphasis in original); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988) ("A motion under Fed.R.Civ.P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim.")

Finally, in this Motion Rockwell attacks the existence of subject matter jurisdiction as a matter of fact, rather than as a matter of pleadings. The importance of this distinction

is described in *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977):

> [W]e must emphasize a crucial distinction, often overlooked, between 12(b)(l) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar safeguards to the plaintiff: the court must consider the allegations of the complaint as true. The factual attack, however, differs greatly for here the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, *no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.*

*Id.* at 891 (emphasis added). *See also Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986) ("[A] court asked to dismiss for lack of jurisdiction may resolve factual disputes to determine the proper disposition of the motion. * * * Were it otherwise, a party could bootstrap jurisdiction simply by the use of artful pleading. The nature of jurisdiction requires that courts establish in fact, rather than assume blindly, their power to hear a dispute.") Because Rockwell is attacking the existence of subject matter jurisdiction as a factual matter, this Court "may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist." *Koch Industries*, 971 F.2d at 551 n.1, *quoting Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965).

### A. *Allegations of False Statements and Concealments by Rockwell Were Publicly Disclosed in a Criminal Hearing and in the News Media Before Stone Commenced This Action.*

It is undisputed that the allegations of false statements and concealments by Rockwell were publicly disclosed in a criminal hearing and in the news media before Stone commenced this action. Indeed, the news media itself recognized this fact. The November 14, 1990 *Boulder Daily Camera* stated: "Most of the claims in Rocky Flats whistleblower Jim Stone's $1 billion lawsuit against Rockwell aren't new. They've been the subject of news articles, public hearings, admissions or lawsuits." (Attachment A-10 p. 20.)

Both the Search Warrant Affidavit, which was made available to the public pursuant to court order in a criminal proceeding,[2] and the news media, including *The Denver Post*, the *Rocky Mountain News*, the *Boulder Daily Camera*, the *Arvarda Sentinal*, the *Westminster Sentinal*, the *Broomfield Enterprise*, *The New York Times*, the *Wall Street Journal*, the *Los Angeles Times* and the *Austin (Texas) American-Statesman*, disclosed allegations of false statements and concealments by Rockwell before Stone commenced this action. *See* Attachment A-10. The disclosure of such "allegations," as distinguished from information or evidence supporting the allegations, is all that section 3730(e)(4)(A) requires. *See Wang*, 975 F.2d at

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[2] The public release of the affidavit pursuant to Magistrate Schauer's order is unquestionably a "public disclosure" in a "criminal hearing," within the meaning of section 3730(e)(4)(A). *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1156 (3d Cir. 1991) ("*Stinson*") (section 3730(e)(4)(A) "should be interpreted broadly to include allegations and information disclosed in connection with . . . criminal . . . litigation"). *See also Black's Law Dictionary*, at 721 (6th ed. 1990) (the term "hearing" includes "whatever takes place before magistrates clothed in judicial functions and sitting without a jury at any stage of the proceedings subsequent to its inception").

1418 ("[The FCA] bars suits based on publicly disclosed 'allegations or transactions,' not information. * * * The Act appears to be invoking the common logical distinction between an assertion and its proof. * * * An allegation can be made public, even if its proof remains hidden.")

Even if Stone based the allegations of false statements and concealments set forth in his complaint on information he developed independently of the Search Warrant Affidavit and the news media—and he emphatically did not, for the reasons discussed below—the "public disclosure" prong of section 3730(e)(4) would still be satisfied. As the Second Circuit declared in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("*Doe*"):

> The relator's final argument is that his complaint is not *based upon* allegations or transactions that were publicly disclosed in a manner provided in the statute. * * * The relator's argument misses the point. The allegations in his complaint are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit. Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information. * * * Were it otherwise, parasitic actions would flourish.

Finally, even if Stone's *qui tam* action were only partly supported by the allegations disclosed in the Search Warrant Affidavit and the news media, the "public disclosure" prong of section 3730(e)(4) would be satisfied. As the Tenth Circuit declared in *Koch Industries*:

> [Section] 3730(e)(4)(A) states a *qui tam* action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." * * * [¶] As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed

> allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely," and we cannot, because to do so would dramatically alter the statute's plain meaning.
>
> * * *
>
> [W]e conclude that a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the "original source" jurisdictional requirement.

971 F.2d at 552 & 553.

Because Stone's *qui tam* action is based at least in part upon allegations publicly disclosed in the Search Warrant Affidavit and the news media, the Court lacks subject matter jurisdiction over this action unless Stone had "direct and independent knowledge" of the information on which his allegations of false statements and concealments by Rockwell are based.

***B. Stone Lacked Direct and Independent Knowledge of Information on Which His Allegations of False Statements and Concealments by Rockwell Are Based.***

In *Koch Industries*, the Tenth Circuit stated:

> Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute.
>
> * * *
>
> "Original source" is expressly defined as "[A]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided

> the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).
>
> Two jurisdictional requirements are evident from the plain language of this provision: 1) a *qui tam* plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a *qui tam* plaintiff must have voluntarily provided such information to the government prior to filing suit.

*Id.* at 553 (emphasis in original). In *Doe*, the Second Circuit summarized the history of the False Claims Act leading up to the enactment of section 3730(e)(4)(B)'s "original source" requirement:

> As originally enacted, the FCA did not require that relators bring any new information to the government's attention; rather individuals were able to bring suit based solely on information already uncovered in the government's investigation and, then, share in the award. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943). *Qui tam* suits by individuals seeking quick cash without assisting in exposing the fraud were aptly characterized by Attorney General Biddle, in 1943, as "parasitic" actions.
>
> *Marcus* represents the high-water mark for parasitic *qui tam* actions. There, the relator's civil complaint appeared to be copied from a criminal indictment. The Supreme Court held that nothing in the FCA barred the relator's action even if his knowledge of the fraud was solely a product of the government's investigation. Reacting to *Marcus*, Congress immediately amended the *qui tam* provisions of the FCA to bar all *qui tam* actions based on information that the government already possessed.

960 F.2d at 321 (some citations omitted).

The court in *Doe* noted that the 1943 FCA amendments had the effect of eviscerating *qui tam* actions, because most *qui tam* plaintiffs reported defendants' fraudulent conduct to the government before filing suit under the FCA. In such cases the *qui tam* plaintiff's FCA claim was deemed to be jurisdictionally barred because the Government already possessed the information on which the claim was based, notwithstanding that the Government had acquired its knowledge only through the *qui tam* plaintiff's disclosure. *Id.* The court in *Doe* stated that Congress accordingly further amended the FCA's *qui tam* provisions in 1986 in an attempt to "strike a balance between encouraging private citizens to expose fraud and *avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud.*" *Id.* (emphasis added).

Thus, while the 1986 amendments to the FCA's *qui tam* provisions were intended to encourage private citizens to expose fraud, they were also intended to ensure that no *qui tam* plaintiff could bring a parasitic suit like *Marcus*. *See, e.g., Stinson*, 944 F.2d at 1163 ("the drafters of the 1986 amendments * * * did not want to restore the opportunity to bring 'parasitic' suits like that encountered in *Marcus*"); *Doe*, 960 F.2d at 322 (Congress drafted the 1986 amendments to the FCA's *qui tam* provisions "to avoid the blatant opportunism embodied in cases like *Marcus*"); Brody, "Recent Developments in the Area of 'Qui Tam,'" *Fed. Bar & News J.* 592, 595 (Dec. 1990) ("One of the principal goals of barring *qui tam* actions based on public disclosures is to prevent the 'parasitical' or 'copycat' lawsuit."); Oparil, "The Coming Impact of the Amended False Claims Act," 22 *Akron L. Rev.* 525, 549 (1989) ("Clearly, the purpose of the [1986] amendment was to retain the 1943 Amendment's bias against parasitic lawsuits."). As one court has noted, "[t]he primary problem in *Marcus* was that the relator had acted on information

developed *by the government* in its own investigations, and therefore provided the government with no new information. * * * [S]uch a situation creates 'unseemly races for the opportunity of profiting from the government's investigations.'" *Stinson*, 944 F.2d at 1163 (emphasis in original) (*quoting Marcus*, 317 U.S. at 547).

Although the FCA's *qui tam* provisions were plainly intended to prevent *qui tam* plaintiffs from profiting from information developed by the Government in its own investigations, Stone has admitted that his FCA claim is based almost entirely on such information. Rockwell's Interrogatory No. l(a) asked Stone to set forth the facts constituting Rockwell's alleged misconduct at Rocky Flats. In his original response to that interrogatory, Stone stated that those facts included:

> 1. Any and all facts ... discovered ... as a result of the joint investigation of the [EPA, FBI and DOJ] ...which produced the 121 page Search Warrant ...;
>
> 2. Any and all facts stated in or referred to in the Search Warrant, or any documents or other things seized thereunder...;
>
> 3. Any and all facts discovered, presented, testified to, or otherwise obtained through or in connection with the U.S. Grand Jury (No. 89-2) ...;
>
> 4. Any and all facts ... alleged in ... all indictments or charges of violation of law made by or as a result of the Grand Jury ....

(Attachment A-6, ¶¶ 1-4.) Lest there remain any doubt that Stone was basing his FCA claim on information developed by the Government in its own investigations, Stone proclaimed that his suit was also based on information discovered as a result of investigations conducted by: (1) DOE's Criticality Safety Assessment Team (*id.* ¶ 5); (2) DOE's Inspector General (*id.* ¶ 7); (3) the Colorado Department of Health (*id.* ¶ 8); (4) the House Subcommittee

on Legislation and National Security (*id.* ¶ 15); and (5) the House Committee on Transportation and Hazardous Materials (*id.* ¶ 16).

When Rockwell pressed Stone for more specific information about Rockwell's alleged wrongdoing, Stone resorted to the technique used by the *qui tam* plaintiff in *Marcus*: wholesale copying of allegations made by the Government as a result of its own investigations. Stone's technique differed from Marcus' principally with respect to the documents from which he plagiarized: While Marcus copied the allegations from a criminal indictment, Stone copied the allegations from the Search Warrant Affidavit and from the Government's Sentencing Memorandum in *United States v. Rockwell*, Case No. 92-CR-107 (D. Colo.). As Attachment A-4 to Rockwell's Motion reveals, Stone's Third Supplemental Response to Interrogatory No. l(a) (Attachment A-7) contains 14 allegations that are substantively identical to allegations contained in the Search Warrant Affidavit, and 14 allegations that are substantively identical to allegations contained in the Government's Sentencing Memorandum. The following is but one of these 28 instances of plagiarism by Stone:

| *Search Warrant Affidavit* | *Stone's Discovery Response* |
| --- | --- |
| The resubmitted Part A application estimated that Rocky Flats generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes on an annual basis ... Information submitted by or obtained from DOE and Rockwell show that Rocky Flats in fact generated or accumulated at least 25,227 pounds of RCRA hazardous wastes in 1984 (almost twice the amount estimated in August 1983) ...(Search Warrant Affidavit ¶¶ 5.10 & 5.11.) | The resubmitted Part A application estimated RFP generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes at RFP. Information obtained by EPA showed, in fact, that RFP generated or accumulated at least 25,227 pounds of RCRA hazardous waste in 1984, nearly twice the sum estimated in 1983. (Stone's Third Supplemental Response ¶ 1(b)(11).) |

Stone's FCA action is precisely the kind of "copycat" or "parasitical" lawsuit that *Marcus* embodied, and that the amended FCA's *qui tam* provisions were intended to prevent. Stone will nevertheless argue that this case is distinguishable from *Marcus* because he, unlike Marcus, was an insider who blew the whistle on the defendant's fraud against the Government. This contention is both legally and factually baseless.

The FCA's *qui tam* provisions plainly require that the *qui tam* plaintiff have direct and independent knowledge *of the defendant's fraud*. See, for example:

- *Senate Report concerning 1986 FCA Amendments*: The purpose of the FCA is "to encourage any individual *knowing of Government fraud* to bring that information forward." S. Rep.

No. 345, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267.

- *House reporting concerning 1986 FCA Amendments*: "The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals *who are aware of fraud being perpetrated against the Government* to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986).

- *Stinson*: "One theme recurring through the legislative history in 1985 is the intent to encourage persons *with first-hand knowledge of fraudulent misconduct* to report fraud." 944 F.2d at 1154.

- *Doe*: "By allowing *qui tam* relators to share in any recovery, the FCA encourages those *with knowledge of fraud against the government* to bring that information to the fore." 960 F.2d at 321.

(Emphases added throughout.)

Stone concurs in this interpretation of the amended FCA's *qui tam* provisions. *See* Complaint ¶ 3 ("the 1986 amendments [to the FCA] were intended by Congress to create incentives to persons, *who are aware of ... false or fraudulent practices* used against the Government, to disclose such information"). Stone has also made it clear that, while a portion of his case involves Rockwell's alleged ES&H violations, the "gist" of his case involves Rockwell's alleged concealment of those violations from the Government, and false statements to the Government that no such violations had occurred:

> Unquestionably, a portion of Plaintiffs' case involves ... violations of state and federal health, safety, and environmental laws and regulations. However, *the gist of Plaintiffs' complaint is ... that Rockwell knowingly concealed [the ES&H violations] from the Government, and falsely represented that it was*

> *in compliance with legal and contractual requirements*, so as to induce the Government to continue to make payments in connection with the operation of Rocky Flats Plant.

(Stone's Response to Motion To Dismiss, p. 7 (emphasis added; citations omitted).)

Thus, to avoid section 3730(e)(4)'s jurisdictional bar Stone must prove that when he filed his FCA claim he had "direct and independent knowledge" of the "gist" of that claim, *i.e.*, false statements and concealments by Rockwell. As the Third Circuit held in *Stinson*: "[T]he relator must possess *substantive information about the particular fraud*, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." 944 F.2d at 1160 (emphasis added).

In fact, Stone has admitted that he not only lacks the "direct and independent" knowledge of false statements/concealments required by the FCA; he lacks *any* knowledge of such misconduct. Specifically, Stone has admitted that he cannot identify: (1) a single Rockwell employee who falsely told the Government that Rockwell was in compliance with the ES&H provisions; (2) a single Rockwell employee who concealed ES&H violations from the Government; (3) a single document which falsely stated that Rockwell was in compliance with the ES&H provisions; or (4) a single document indicating that Rockwell concealed ES&H violations from the Government. Stone has also admitted that has no personal knowledge regarding Rockwell's presentation to the Government of claims for payment for the operation of Rocky Flats. *See* Stone's interrogatory and deposition answers quoted at pages 5-7. Under these circumstances Stone cannot possibly satisfy the FCA's "direct and independent knowledge" test. *Cf. Koch Industries*, 971 F.2d at 554 (*qui tam* plaintiff failed "direct and independent knowledge" test where its information was "weak, informal and strikingly redundant").

## *III. CONCLUSION*

A Court is without subject matter jurisdiction over a *qui tam* plaintiff's FCA claim where, as here, (1) that claim is based on publicly disclosed allegations of false statements/concealments, and (2) the plaintiff lacks direct and independent knowledge of information supporting those allegations. Rockwell accordingly requests that the Court enter an order dismissing this case for lack of subject matter jurisdiction.

Dated: December 15, 1992.

WILLIAMS, YOULE & KOENIGS, P.C.

By: /s/ Christopher J. Koenigs
Michael A. Williams
Christopher J. Koenigs
Thomas P. McMahon
One Tabor Center, Suite 1420
1200 Seventeenth Street
Denver, Colorado 80202
(303) 572-6700

Attorneys for Defendant
Rockwell International Corporation

# United States District Court

DISTRICT OF COLORADO

| In the Matter of the Search of<br>* * * | |
|---|---|
| The Rocky Flats Plant<br>U.S. Department of Energy<br>Rockwell International Corporation<br>Highway 93<br>Golden, Colorado 80402 | APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT<br><br>CASE NUMBER |

I Jon S. Lipsky being duly sworn depose and say:

I am a(n) Special Agent, Federal Bureau of Investigation and have reason to believe that ☐ on the person of or ☒ on the property or premises known as * * *

The Rocky Flats Plant, U.S. Department of Energy, Rockwell International Corporation, Highway 93, Golden, Colorado 80402, (as more particularly described in Attachment 1 incorporated here by reference)

in the State and District of Colorado there is now concealed a certain person or property, namely * * *

the property described on Attachment 2 (incorporated here by reference) which is

evidence or the means or instrumentalities of, or the fruits or other results of, criminal violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1319(c), and 18 U.S.C. §§ 1001 and 2.

The facts to support a finding of Probable Cause are set forth in Attachment C, incorporated here by reference.

| Continued on the attached | ☒ Yes | ☐ No |
|---|---|---|

| | | |
|---|---|---|
| sheet and made a part hereof. | | /s/ [Name Illegible]<br>Signature of Affiant |
| Sworn to before me, and subscribed in my presence<br>_____<br>Date | at | Denver, Colorado<br>City and State |
| _____<br>Name and Title of Judicial Officer | | /s/ [Name Illegible]<br>Signature of Judicial Officer |

ATTACHMENT 1

ATTACHMENT 3

1. INTRODUCTION

1.1. Your affiant is a Special Agent with the Federal Bureau of Investigation ("FBI") assigned at Denver, Colorado. I have been an FBI agent since February, 1984. The FBI derives its general investigatory jurisdiction from Titles 18 and 28 of the United States Code. Title 28, U.S.C. § 535 gives the FBI jurisdiction to investigate alleged crimes involving United States Government officers and employees, and 42 U.S.C. § 2271(b) gives the FBI primary jurisdiction concerning the investigation of alleged crimes committed at United States Department of Energy ("DOE") facilities. The FBI has concurrent jurisdiction with the United States Environmental Protection Agency ("EPA") to investigate the alleged violation of federal environmental laws.

1.2. I have attended three different training sessions concerning the investigation and prosecution of environmental crimes, for a total of 13 days of intensive course work, lectures and seminars on the Resource Conservation and Recovery Act ("RCRA"), the Federal Water Pollution Control Act (popularly known as the "Clean Water Act" or "CWA"), and other federal environmental laws. I have been the lead investigator or a substantial participant in at least 13 investigations of environmental crimes. I have been a lecturer or speaker at three FBI training conferences concerning investigation of environmental crimes. I have received five commendations for my work in this area.

1.3. The other lead investigator concerning this matter is William F. Smith. Mr. Smith is a Special Agent with EPA's Office of Criminal Investigations ("OCI") and is also assigned at Denver, Colorado. Agent Smith has been an OCI Special Agent since November 1984, and also has seven years' experience in other federal law enforcement. In addition to his extensive training concerning the investigation of environmental crimes, Agent Smith has

been involved in numerous environmental investigations, has taught at five FBI training conferences concerning environmental crimes and has supervised other OCI agents in investigating such cases.

1.4. This Application is based upon the investigation conducted to date by the FBI and the EPA, including Special Agent Smith and EPA's National Enforcement Investigations Center, together with the United States Department of Justice and the United States Attorney's Office for the District of Colorado. The following statements are based upon a review of numerous studies, reports and documents from federal, state and local governments and agencies, including the EPA and the Colorado Department of Health ("CDH"), as well as materials submitted to various agencies by, or otherwise obtained from or concerning DOE and Rockwell International Corporation ("Rockwell"). The following statements are also based upon my own physical observations and those of others, as well as interviews conducted with various people. All legal analysis is based upon the advice and assistance of the Department of Justice and the United States Attorney's Office. All referenced exhibits are incorporated as part of this Application.

* * *

False Statements and Concealment

2.10. Consistent with their efforts to keep the public from knowing "just how really bad the site is," July 1986 DOE Memorandum (emphasis added), there is probable cause to believe that Rockwell and DOE officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations, and concealed Rocky Flats' "serious contamination." Id.

2.11. While DOE concluded in December 1988 that groundwater contamination at Rocky Flats was the greatest single environmental hazard at all of DOE's nuclear weapons facilities, there is probable cause to believe that Rockwell and DOE officials falsely certified in November 1985 that Rocky Flats was "in compliance with all applicable

[RCRA] groundwater monitoring [requirements]." In fact, and contrary to such certification, various Rockwell and DOE officials were aware of serious contamination and were informed that the monitoring system was deficient, did not comply with RCRA, and produced data of limited (or questionable) validity.

2.12. In or about May 1987, DOE awarded Rockwell a performance bonus of approximately $8.6 million, based on Rockwell's alleged "excellent" management at Rocky Flats. DOE officials rated the health and safety programs at Rocky Flats "very good" and said that the plant's programs to manage radioactive and toxic wastes were "excellent," despite other DOE findings that some of Rocky Flats' waste facilities were "patently 'illegal,'" that Rockwell had significant problems in controlling radioactive contamination at the plant and that Rockwell provided DOE with erroneous and incomplete reports on environmental, health and safety matters. In addition, three separate DOE inspections at Rocky Flats since 1986 have noted serious health and safety problems and severely criticized Rocky Flats' management.

2.13. In December 1988, Rocky Flats officials failed to report two discharges from Rocky Flats in November 1988 into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies, which contained chemical pollutants not authorized by Rocky Flats' CWA permit. Rocky Flats also failed to disclose at least three illegal discharges in December 1988 (¶ 2.8) from the plant's sewage treatment facility.

2.14. There is also probable cause to believe that Rocky Flats operated the plant's Building 771 incinerator in December 1988 to treat or dispose of hazardous or mixed wastes, contrary to public statements that Building 771 was shutdown from October 1988 to late January 1989.

2.15. Such false statements and concealment are apparent violations of various environmental statutes, such

as 42 U.S.C. § 6928(d)(3), as well as 18 U.S.C. § 1001.

2.16. In sum, there is probable cause to believe that environmental and other crimes have been committed at Rocky Flats and that evidence of such crimes is located there.

* * *

5.22. As part of Rocky Flats' November 8, 1985 submission, DOE's Albert E. Whiteman and Rockwell's J. E. Dorr also certified that Rocky Flats' groundwater monitoring system complied with RCRA's requirements. As discussed in Part 10, this certification was false, in violation of 18 U.S.C. § 1001.

* * *

regulatory personnel to conduct the necessary permit analysis. In its response dated May 2, 1989, DOE indicated its willingness to request a continuance "until such time (as) CDH [can] enhance Q-cleared staff and review, to its satisfaction, information relative to the issuance of a final permit."

5.55. In sum, the investigation to date shows a substantial history of RCRA issues and alleged violations at Rocky Flats, and establishes DOE's and Rockwell's clear knowledge of federal environmental law and regulation. Rocky Flats does not have a RCRA permit and several enforcement proceedings are ongoing. There is probable cause to believe that hazardous and mixed wastes have been illegally treated, stored and disposed of at Rocky Flats, in violation of 42 U.S.C. § 6928(d)(2); that DOE and Rockwell have repeatedly failed to provide EPA and CDH with complete and accurate waste information necessary to proper regulation; that wastes have been improperly mixed, contrary to 42 U.S.C. § 6928(d)(2); and that false statements and concealment of material facts have occurred, in violation of 42 U.S.C. § 6928(d)(3) and 18 U.S.C. § 1001. In conjunction with ¶¶ 1.18 – 1.22, there is probable cause to believe that evidence of such crimes is located at Rocky Flats, in Buildings 111, 115, 122, 123, 706 and 776, as well as

the Wind Systems Building.

9.25 There is probable cause to believe that DOE and/or Rockwell have made false statements to or concealed material facts from the EPA concerning discharges from Rocky Flats to "navigable waters", in violation of 18 U.S.C. § 1001, and has criminally violated the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c), by negligently or knowingly discharging pollutants, into Walnut and Woman Creeks since at least 1987, without a permit or in violation of Rocky Flats' permit conditions.

* * *

10.15. On November 8, 1985, DOE submitted a Part B RCRA permit application to EPA, concerning Rocky Flats' status and operation as a RCRA hazardous waste facility. Both DOE's Acting Area Manager, Albert E. Whiteman, and Rockwell's Vice President and General Manager, J. E. Dorr, certified "under penalty of law" that they had examined the application, that they were familiar with its information and that such information was "true, accurate and complete." Mr. Whiteman and Mr. Dorr certified that the solar ponds at Rocky Flats known as Ponds 207A, 207B and 207C were "in compliance with all applicable groundwater monitoring and financial requirements stated or referred to in (RCRA), as amended." The certifications were footnoted as follows: "The present solar pond groundwater monitoring system meets the spirit of RCRA, i.e. detection of groundwater degradation. Although initially designed for radiological purposes, the groundwater monitoring program was modified in 1981 to be <u>essentially equivalent with the RCRA program</u> ...." (Emphasis added.) In fact, the certifications were completely at odds with information known to Rocky Flats' officials.

* * *

10.35. There is probable cause to believe that hazardous wastes have been illegally treated, stored and disposed of at Rocky Flats, in violation of material interim status groundwater monitoring requirements, contrary to 42 U.S.C. § 6928(d)(2), and that false statements have been made concerning the same, involving matters within EPA jurisdiction, in violation of 42 U.S.C. § 6928(d)(3) and 18 U.S.C. § 1001. There is also probable cause to believe that evidence of such crimes is located at Rocky Flats, in Buildings 111, 115, 122, 123, 706 and 776, as well as the Wind Systems Building, where relevant documents are likely to be maintained.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

---

PLAINTIFF JAMES S. STONE'S AMENDED RESPONSES TO INTERROGATORY NOS. 1(d), (1), (m), (n) AND (o), 5, 6, 7, 11(a), 12-16, 21(d), AND 23 (a), (b) AND (d) OF DEFENDANT'S FIRST INTERROGATORIES

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Plaintiff James S. Stone ("Stone"), by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and Breit, Best, Richman and Bosch, P.C., hereby submits the following amended responses to Interrogatory Nos. 1(d), (l), (m), (n), and (o) ,5, 6, 7, 11(a), 12-16, 21(d) and 23 (a), (b) and(d) of Defendant's First Interrogatories:

Interrogatory No. 1 (d), (l), (m), (n), and (o):

d. Identify all Rockwell Employees who you contend had actual knowledge of the facts constituting the violation at the time Rockwell submitted any claim to the Government that you contend was false;

l. State whether you contend that Rockwell affirmatively misrepresented to the Government that it was in compliance with the Environmental and Safety Laws (including regulations thereunder)

and Agreement that you contend were violated by virtue of such facts;

m. If your answer to subpart (l) above is other than an unqualified negative, identify (in accordance with Instruction Nos. 9-10 above) each document or oral communication in which Rockwell made such misrepresentation to the Government;

n. State whether you contend that Rockwell concealed from the Government the facts constituting the violation of the Environmental and Safety Laws and Agreements;

o. If your answer to subpart (n) above is other than an unqualified negative; (i) identify all Rockwell Employees who to your knowledge concealed the violation from the Government, and (ii) identify all documents supporting your contention that Rockwell concealed the violation from the Government;

Amended Response to Interrogatory Nos. 1(d), (l), (m), (n) and (o):

The persons identified in the "Individuals" column of Attachments 1 through 4 of Plaintiff's Consolidated Answers and Responses to Discovery are persons whom Stone believes had actual knowledge of some facts constituting the violation at the time Rockwell submitted false claims to the government. Concerning Instruction No. 8, neither Stone nor his attorneys know the current address, telephone number, or employer of the individuals listed in Plaintiff's Consolidated Answers and Responses to Discovery.

Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other

submissions by Rockwell, reflect concealment of these violations. However, under the terms of the contracts between Rockwell and the U.S. Government relative to the operation of RFP (and Modifications thereto) previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, Rockwell was required to comply with all laws and regulations of the United States, which include laws, statutes and regulations governing the environment, health and safety. Furthermore, Modification 111 to the base contract, previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government in payment of fixed fees, base fees and award fees, as well as GAO payments, under the respective agreements relative to the operation of RFP, when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

Interrogatory No. 5:

With respect to your allegations, set forth in paragraphs 15 and 20 of the Complaint, that Rockwell conspired with others to (a) defraud the Government in order to obtain approval of a false or fraudulent claim, and (b) conceal the true nature and extent of its

* * *

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Case No. 89-C-1154
THE DEPOSITION OF JAMES S. STONE
VOLUME I

November 2, 1992
UNITED STATES OF AMERICA, ex rel. JAMES S. STONE,
Plaintiff,
-vs-
ROCKWELL INTERNATIONAL CORPORATION,
Defendant.

PURSUANT TO NOTICE, the deposition of JAMES S. STONE, VOLUME I, was taken on behalf of the Defendant, pursuant to the pertinent Federal Rules of Civil Procedure, at 9:15 a.m., this date, at 1200 Seventeenth Street, Suite 1420, Denver, Colorado, before Cornella Van Esso, Notary Public and Court Reporter, State of Colorado.

* * *

[110]

Q: How long did it take you to do that?
A: About three days.
Q: Are you planning on testifying as an expert witness in this litigation? I presume you're not.
A: I don't know.
MR. BREIT: He is not.
MR. MCMAHON: And just for the record, just so that we're clear on the specificity, John, that you gave me with respect to modification 111, the page numbers and subsections and sub-paragraphs, that's the kind of specificity that would be very helpful, that we would have liked to have had in all of this.
MR. BREIT: We'll try to do that. We're in the process, and we will deliver to you so there's no question as to what

our contentions are.

MR. McMAHON: Okay.

MR. BREIT: Okay.

Q: (By Mr. McMahon) Mr. Stone, you started to talk about the cooling tower, the conversation over the cooling tower, and the incident with Ron Foster. Aside from that, were there any other [111] matters that you know of where Rockwell affirmatively represented to DOE that Rockwell was in compliance with environmental, safety, and health provisions, when it was not?

A: I can't remember any.

Q: Okay. Other than that—and you don't even have any documents relating to the cooling tower incident, right, that indicate any misrepresentations of concealment?

MR. BREIT: I'm going to object. It's not part of the case, and it doesn't matter.

MR. McMAHON: Let me withdraw it.

Q: (By Mr. McMahon) Other than the cooling tower incident, you don't have any documents evidencing concealing or misrepresenting that Rockwell was in compliance when it was not; is that right?

A: That would require a legal conclusion, I believe.

Q: As far as factually, you don't know of any?

A: I don't know.

Q: Okay. Now, you started to say something, and I gave you a label of passive non-disclosure, in other words, failing affirmatively to come forward and make disclosure to the government of [112] violations. Do you understand my use of that terminology?

A: Yes.

Q: Is it your contention in this lawsuit that what Rockwell has really done is that it has failed to come forward and tell the government that it was in violation of various environmental, safety, and health provisions?

A: That requires a legal interpretation, and I was not privy to that activity.

MR. BREIT: Tom, I can tell you, in part, our position is precisely that, that Rockwell, while knowingly was in violation of statutes, ordinances, and regulations, accepted money to which it was not entitled due to those violations, without disclosing the breach of the contract or those regulations, orders, and statutes.

MR. McMAHON: Does that constitute a false claim?

MR. BREIT: Yes, in part.

MR. McMAHON: And, in part, there were, according to, as I understand the Amended Discovery Responses, there were false certifications? Is that the Plaintiff's theory?

MR. BREIT: Yes. [113]

MR. McMAHON: Okay.

Q: (By Mr. McMahon) Can you point me, Mr. Stone, or can you produce to me or show me where to find any specific documents where Rockwell falsely certified that it was in compliance when it was not?

A: No.

Q: Now, you understand that Rockwell was on essentially a year-to-year contract with the Department of Energy?

A: No.

Q: Okay, What is your understanding of Rockwell's contract with DOE?

A: They had a five-year contract. They're on their second.

Q: I'm sorry?

A: They were on their second five-year contract when I went to work for them.

Q: All right. Do you have an understanding as to how often Rockwell was evaluated by the Department of Energy?

A: Yes.

Q: Okay. And what is that understanding?

A: I believe it was semi-annually.

Q: So, roughly every six months? [114]

A: Yes.

Q: Okay. And do you have an understanding of how that evaluation impacted Rockwell's compensation?

A: Yes.

Q: And what is that understanding?

A: That we were graded—that Rockwell was graded on a number of parameters, the performance of a number of parameters, that DOE submitted and evaluated Rockwell's performance on.

Q: Okay. And by performance areas, are you talking about functional performance areas?

A: Yes.

Q: Are you familiar with that terminology?

A: Yes.

Q: Okay. Okay. Do you have an understanding as to how many functional performance areas there were in any given evaluation period?

A: I believe there might have been twenty parameters, categories, that they would be evaluated on, and—

Q: And they'd get a score in each category?

MR. BREIT: If you know.

A: I don't know.

Q: (By Mr. McMahon) Well, was it your [115] understanding, as a general matter, that the higher score Rockwell got, the greater amount it would get in the way of remuneration from the government?

A: Yes.

Q: On page 8 of Exhibit 39, actually pages 8 to 10, of your Amended Response to Interrogatory Number 15, you set forth a number of functional performance areas with respect to various modifications of the contract covering various time periods, most of which appear to be one-year time periods, and then showing for each of those performance areas a certain percentage.

Do you see that?

A: Yes.

Q: And it is your contention, I take it, that the

violations of environmental, safety, and health provisions that you contend Rockwell engaged in impacted these various functional performance areas during these time periods?

A: Yes.

Q: Okay. Is it your contention that, if Rockwell engaged in one environ-

* * *

[122]

in causing to be presented."

You know, I think, and it's been my personal supposition anyway, that what is really at issue here is Rockwell presenting, not causing somebody else to present, false claims, but we would like that pinned down.

MR. BREIT: That's fair. To my knowledge, qualified by discovery to date, it is our position that it is Rockwell who has presented as opposed to causing some other party to present.

MR. McMAHON: I think we can have some sort of a stipulated agreement. If I find something that causes you to expand your view as to that, then we reserve the right to inquire further.

MR. BREIT: Sure. Absolutely. I'm trying to be as—give you as much insight as I can into our position. reserving only as to matters that may come up in further discovery.

MR. McMAHON: Okay.

MR. BREIT: We're not ready to state substantially for that purpose; and, in fact, this sort of deposition is very helpful that you have, quote, any of our representations. All it takes is a phone call and letter to you, as promptly and succinctly as possible, without the necessity of [123] filing Motions and engaging in litigation over those sorts of things.

Q: (By Mr. McMahon) Along that line then, I just—let's direct our attention to subparagraph B, Mr. Stone. I take it then that what you're contending there is that

Rockwell knowingly made or used false records to obtain approval for payment of false claims? You're not saying that Rockwell caused somebody else to make or use false records?

A: I'm saying that Rockwell caused it.

Q: Okay. All right. And let me—I can probably shorten this considerably.

Do you have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government?

A: No.

Q: You don't have any paperwork that Rockwell might have submitted or that the government reviewed or anything like that?

A: No.

Q: And do you know who at Rockwell actually submitted paperwork to the government seeking to get Rockwell's claims paid? **[124]**

A: Yes. I used to know his name, but I would have to look at a directory to find it.

Q: Is it somebody who is the treasurer or the comptroller—

A: Yes.

Q: —or somebody like that?

A: Yes.

Q: I presume that the claims you're talking about are the claims for payment every six months or so—

A: Yes.

Q: —during these evaluation periods?

A: Yes.

Q: And as you sit here, you probably don't have the specific dates on which paperwork was submitted or that the claims were paid?

A: No.

Q: Presumably, the claims we're talking about here are the claims made to the Department of Energy—

A: Yes.

Q: —for payment? I think, for clarity on the record, and for the Reporter, I think you have used the term "DOE" a few times. By that you mean D-O-E, the Department [125] of Energy?

A: Yes.

Q: And, presumably, you don't know exactly who at the Department of Energy received paperwork from Rockwell requesting payment, or who actually made payment to Rockwell?

A: I knew his name. It sounds like Brizinski (phonetic). It's a Polish name or something like that.

Q: Let me ask this. Do you know, was this person in the Rocky Flats Area Office of DOE?

A: No. It was Albuquerque.

Q: DOE, Albuquerque?

A: Yes.

Q: Would Rostenkowski sound—

A: Yes.

Q: Ron Rostenkowski?

A: I don't know the first name, but it's Rostenkowski, yeah.

Q: He would be the person to whom the paperwork was submitted, to your understanding?

A: Yes.

Q: And would he make the final determination as to how much Rockwell would get paid?

MR. BREIT: If you know. [126]

A: No.

Q: (By Mr. McMahon) Do you know if that determination was made in Washington?

A: I understood that it was. My impression was that there was a Contracting Officer that made that determination in Albuquerque.

Q: Do you know who that Contracting Officer was?

A: No.

Q: Now, is it your position—what is your position with respect to whether anyone at DOE was aware of any of the

environmental, safety, or health violations that you are alleging in this lawsuit?

A: I have no position on DOE.

Q: You don't know whether they knew or didn't know?

A: Yeah.

Q: You're not saying they didn't know? You're saying "I don't know?"

A: I said I have no position on that. I don't know what they knew.

Q: So, you don't have any evidence one way or the other as to what DOE knew or didn't know?

A: That's right. [127]

Q: Do you have a feeling as to whether DOE knew or didn't know?

MR. BREIT: Well, I'm going to object to "feelings." That's something worse than rank speculation.

MR. McMAHON: I think Mr. Stein stated his position in this regard many times in many forms.

MR. BREIT: I understand, but it doesn't have any legal significance what he feels or speculates or surmises, nor is it relevant or admissible in any legal proceedings.

MR. McMAHON: I think it's reasonably calculated to lead to the discovery of admissible evidence.

MR. BREIT: If you have a feeling or suspicion, you can—

A: I believe the case has been narrowed to the issues in this case, and I have put all the other considerations out of my mind. I don't have any feelings about anything other than the issues that I'm trying to concentrate on and give you as much information as I can that relates to this specific case.

* * *

DAILY CAMERA Wednesday, June 7, 1989

# AGENTS PROBE ALLEGATIONS AT ROCKY FLATS

## CHARGES INCLUDE VIOLATIONS OF ENVIRONMENTAL LAWS, LYING

By LINDA CORNETT and BILL SCANLON
Camera Staff Writers

DENVER – A team of 75 federal agents, dressed in protective clothing and carrying a federal criminal warrant, moved in on Rocky Flats nuclear weapons plant Tuesday morning to investigate charges that Rocky Flats employees violated environmental laws and lied to cover up the violations.

Investigators from the FBI, Environmental Protection Agency and Department of Justice plan to spend about 10 days, round-the-clock at the nuclear weapons plant south of Boulder collecting documents and samples. They will spend another six months to a year studying the results before deciding what felony charges, if any, are filed.

U.S. Attorney General for Colorado Mike Norton said Tuesday that a federal grand jury will be convened to investigate the same allegations, and Henson Moore, deputy secretary of the Department of Energy which contracts with Rockwell International Corp. to operate the plant, said the DOE [illegible] its own investigation. DOE has promised full cooperation with the investigation, he said. "We take this matter very seriously."

According to the U.S. Department of Justice, the specific allegations include:

- Unpermitted treatment, storage and disposal of hazardous and mixed radioactive and hazardous waste.
- The discharge of pollutants without a permit or in excess of permit limits.

- False certification of federal environmental reporting requirements.
- Concealment of environmental contamination.

At the plant, spokesman Pat Etchart said employees have been told to cooperate with the investigation. The plant will continue to operate.

Federal agents also began a search of DOE offices in Albuquerque, N.M., that supervise Rocky Flats.

The on-site probe and the year-long investigation that led up to it were news to state officials. Gov. Roy Romer and state Health Department Director Tom Vernon were informed at 1 p.m. Tuesday, just a half hour before a scheduled press conference.

Romer said he had been promised a daily update on the investigation and is convinced federal officials will close the plant if they find evidence that it poses a hazard to employees or Colorado citizens.

But, "I sit here today very angry, very angry," the governor said, recalling his much-publicized visits to the plant and his resulting assurances that there was no health threat. "It jars you to the bone to realize the judgments we made in Colorado may have been made on bad information."

Federal officials refused to say what prompted the investigation "to preserve the safety and integrity of our investigative team and their sources," in Norton's words.

However, Norton stressed, "There is no reason at this time to believe the allegations pose any new or different imminent threat to public health or safety."

The state's limited monitoring of the air and ground water around Rocky Flats supports that assurance, Vernon said.

Representatives of citizens groups who have long demanded the shut-down of the plant disagree. "They keep saying there is no threat to the public health, but there always has been and there still is," said Eugene DeMayo, state vice chairman of the Sierra Club.

Norton said Tuesday he will ask a delay on a lawsuit

filed by the Sierra Club June 2 demanding that two incinerators used at the plant to burn plutonium waste and other toxic materials be shut down. DeMayo said the Sierra Club lawsuit should continue.

U.S. Rep. David Skaggs, D-Colo., said the investigation proves that DOE cannot police itself and the large number of investigators descending on the plant indicates a number of employees are suspected.

The Rocky Flats plant, east of Colorado 93 between Boulder and Golden, has a history of problems. In October, the plant's main plutonium reprocessing building was shut for four months after an accident exposed three workers to radioactive contamination. In December, Rockwell paid $47,500 in fines for violating federal laws regulating disposal of toxic chemicals and a DOE report detailed 32 new problems.

In March, state Department of Health officials investigated a toxic spill into the plant's sewage system and tainted water sprayed onto surrounding fields.

DENVER POST Wednesday, June 7, 1989

# Federal Agents Raid Rocky Flats

## Illegal Storage, Disposal Of Hazardous Waste Alleged

By Thomas Graf and Peter G. Chronis
Denver Post Staff Writers

More than 70 federal agents raided the Rocky Flats nuclear weapons plant yesterday as part of a massive criminal investigation into an alleged coverup of illegal storage and disposal of radioactive and hazardous waste.

The investigation is the largest ever of a U.S. Department of Energy facility, the first criminal probe ever of a nuclear facility, and the latest black mark on Rocky Flats' spotty environmental record.

The probe, which began in secret two years ago, was announced yesterday.

Officials said it may take another six months to a year to complete, and that parts of the plant may have to be shut down during the probe.

The plant, 18 miles northwest of Denver, is operated by Rockwell International Corp.

It makes triggers for nuclear weapons.

Mike Norton, acting U.S. attorney in Denver, said federal authorities are investigating these and other allegations:

That Rocky Flats illegally treated, stored and disposed of hazardous and radioactive wastes;

That it discharged pollutants without permits or in excess of permit limits;

That the plant falsified documents showing compliance with environmental-reporting rules and concealed contamination.

Norton said one allegation is that mixed hazardous and radioactive wastes may have been discharged into creeks flowing through Rocky Flats. He declined to identify the streams.

Several streams cross the Rocky Flats site, including Upper Church Ditch flowing into Upper Church Lake, Walnut Creek flowing into Great Western Reservoir, Woman

Please see FLATS on 7-A

## Quick action vowed If health threats found

FLATS from Page 1-A

Creek flowing into Standley Lake, and Rock Creek.

Justice Department officials indicated that the probe was primarily focused on previously reported acts of pollution, rather than new acts waste disposal.

According to a Justice Department statement released yesterday, "No new environmental dangers have been indentified by this investigation. The thrust of our investigation is to determine whether there have been any false statements or concealments."

Agents of the FBI, the Environmental Protection Agency's Office of Criminal Investigations and the DOE's Inspector General office swept onto the 6,500-acre facility at 9 a.m. to search for records and evidence, as well as air, water and soil samples.

Many of the agents wore protective clothing, said Bob Pence, agent in charge of the FBI's Colorado office.

### Long search planned

The search will take 10 days, partly because of the need to proceed cautiously in dealing with hazardous-waste materials, officials said.

In Washington, Energy Secretary James D. Watkins told reporters that parts of the plant would be shut down as a result of the investigation.

An Energy Department spokesman, however, said the precise operations and the number of personnel that may be affected has not yet been determined. Local officials

indicated that parts of the plant may have to be shut down as investigating agents seek access to them.

Norton and other federal investigators released only general information about the investigation.

But Norton said that if the probe uncovers any indication of new health or safety threats at Rocky Flats, appropriate state and federal authorities will be notified immediately.

He said it is of "critical importance" to note that the issues are "allegations only." He said speculation about possible indictments or prosecution would be "premature."

Norton's office is overseeing the probe and will present evidence to the federal grand jury in Denver when it concludes.

Pat Etchart, spokesman for Rockwell International, declined to comment on the probe, except to say that plant employees were being "asked to cooperate in any way possible."

The search was conducted simultaneously with one at the DOE's Albuquerque operations office, which oversees Rocky Flats.

Although Norton declined to say what precipitated the probe, a Justice Department source said the investigation didn't result from any "single event, or source, or piece of information. It was a combination of factors." No "whistle blower" was involved, the official said.

U.S. Attorney General Richard Thornburgh, in a statement released in Washington, said the Department of Justice, which normally doesn't reveal continuing investigations, was taking the "highly unusual step" of disclosing the Rocky Flats probe because the search will be "a matter of public record" and also because it is "absolutely essential that the public understand that this investigation does not signal any major new environmental safety or health problem."

About 40 members of Congress, including U.S. Rep. David Skaggs, D-Boulder, were briefed on the probe

yesterday by Watkins. Skaggs said later that the energy secretary revealed few details of the investigation.

"It is unprecedented to have a battalion of FBI agents to descend on a federal facility to conduct an investigation of alleged violations of important environmental laws," Skaggs said. "The only implication that comes out of an action of this scale is that federal authorities were concerned about the destruction of evidence."

Meanwhile, DOE is conducting a separate investigation into the allegations, said Henson Moore, deputy secretary of energy, who arrived at the plant Monday from Washington.

Moore said a 16-member DOE team will conduct an analysis of Rocky Flats operations.

Officials said they would suspend any plant activities that might be made unsafe by the presence of investigators.

Rocky Flats has long been plagued by safety and environmental woes. Safety violations last October led to the closure of the main plutonium reprocessing building for four months. A December report by the DOE listed 32 safety violations and concluded Rocky Flats posed the greatest health risk of all the department's nuclear weapons facilities.

Yet DOE officials more recently have said the plant's operation record is improving. On Jan. 31 of this year, the DOE awarded Rockwell International a five-year, $2.5 billion contract to continue operating Rocky Flats for another five years.

In May, Skaggs and others proposed a congressionally funded study to determine if there is a link between Rocky Flats pollution and cancer cases in the Denver metro area.

At least part of the investigation centers on the use of three plutonium-recovery incinerators at Rocky Flats.

## Sierra Club filed suit

In February, the Sierra Club filed a lawsuit against the DOE and Rockwell, claiming the incinerators were operating in violation of state and federal environmental laws.

The U.S. Justice Department yesterday requested a indefinite postponement of the Sierra Club lawsuit, saying that the federal probe "in part covers the very same issues addressed in this lawsuit."

Adam Babich, the Sierra Club attorney in the case, said he may announce today whether the environmental group will challenge the postponement.

Norton said the federal probe has "raised questions about the validity of statements" made by the DOE in response to the Sierra Club lawsuit.

The incinerators targeted in the Sierra Club lawsuit burn waste contaminated with both radioactive plutonium and non-radioactive hazardous waste and attempt to recover plutonium from the exhaust.

*Denver Post wire services and staff writers Mark Obmascik and Alan Gottlieb also contributed to this report.*

# ROMER ANGRY STATE KEPT IN DARK ABOUT PROBE

By The Denver Post

Gov. Roy Romer reacted angrily yesterday when he learned that state officials had been kept in the dark about the federal investigation into the Rocky Flats nuclear weapons plant.

"I am outraged by the possibility that some possible criminal act has occurred at Rocky Flats that may have endangered the population of this area," Romer said. "It jars me to the bone to realize that the judgments we have made in Colorado about Rocky Flats may have been made on bad information."

The governor has been very active in the ongoing debate about where waste from Rocky Flats will be shipped and stored.

Romer said U.S. Attorney Mike Norton told him about the investigation just an hour before announcing the probe during a Denver news conference yesterday afternoon.

Department of Energy officials did promise to give Romer daily briefings on the probe, and the governor said he hopes to learn more about the case in the next two days.

Federal officials didn't discuss yesterday why state officials weren't briefed sooner.

News of the investigation stunned many people other than Romer, including public officials, environmentalists and others interested in the controversial nuclear weapons plant.

"This kind of thing has never happened before," said Jim Bickel, assistant manager of the federal Department of Energy's Albuquerque operations office. "If it's true, it certainly isn't going to help our credibility." Over 70 FBI agents began searching the plant yesterday morning, checking allegations that hazardous waste was treated, stored and disposed of without permits.

They also were looking for evidence that plant management had concealed environmental contamination and falsified federal environmental reports.

Energy Secretary James Watkins reiterated yesterday that he is committed to operating Rocky Flats and other weapons plants "fully in compliance with all pertinent statutes and in such a manner that the primary concern for environment, health and safety of employees and the public is satisfied."

The north Jefferson County plant's day-shift employees were notified over the public address system that an investigation was in progress, said Pat Etchart, a spokesman for plant contractor Rockwell International. Total plant employment is about 6,000.

Plant critics said the investiga-

Please see **REACTION** on 7A

NEW YORK TIMES June 7, 1989
(Washington) C39-06-045

# *U.S. Begins Criminal Investigation at Nuclear Plant*

By DAVID JOHNSTON
Special to The New York Times

WASHINGTON, June 6—The Justice Department today announced a broad criminal investigation into possible violations of Federal environmental laws at the Rocky Flats Plant in Colorado, which processes plutonium for nuclear warheads.

The investigation centers on whether employees faked documents submitted to state and Federal officials showing that the plant was complying with clean air and water laws, and whether employees discharged pollutants without a permit and concealed contamination, department officials said.

There are also specific allegations of illegal treatment, storage and disposal of hazardous and radioactive waste, the officials said.

**Records Are Seized**

Seventy agents from the Federal Bureau of Investigation as well as investigators from the Energy Department and Environmental Protection Agency began to seize records this morning at Rocky Flats and obtain air, water and soil samples in a search that is expected to take 10 days. Agents also began executing search warrants at the Energy Department's operations office in Albuquerque, N.M., which supervises the Rocky Flats Plant. Government officials did not say whose offices were searched today. Rocky Flats, 18 miles northwest of Denver, is managed by the Rockwell International Corporation under contract to the Energy Department, and the officials said investigators were examining actions of both Government and Rockwell employees. Last year the department identified the plant as

the most environmentally hazardous site in the nuclear weapons industry because toxic chemicals contaminate an underground reservoir and threaten nearby city water supplies.

Adm. James D. Watkins, the Energy Secretary, said tonight that part of the plant would be shut down as a result of the investigation. A department spokesman said the precise operations and the number of employees affected had not been determined.

In a statement, Mr. Watkins said he was suspending "those operations for which safety could be adversely affected by the presence and functioning of the Department of Justice investigating team."

He added: "I have stated repeatedly

*Continued on Page B5, Column 4*

it is my intention to operate Department of Energy facilities fully in compliance with all pertinent statutes and in such a manner that the primary concern for environment, health and safety of employees and public is satisified."

The plant employs about 5,300 workers.

Representative David E. Skaggs, a Colorado Democrat whose district includes the plant, said Mr. Watkins met with up to 40 members of Congress this afternoon at the Energy Department.

Mr. Watkins said he had named a new manager for the plant and was sending as many as 20 people to the plant to monitor environmental, safety and health matters, Mr. Skaggs said.

"It is unprecedented to have a battalion of F.B.I. agents to descend on a Federal facility to conduct an investigation of alleged violations of important environmental laws," Mr. Skaggs said. "The only implication that comes out of an action of this scale is that Federal authorities were concerned about the destruction of evidence."

The inquiry thrusts the Justice Department into a conflict between the Energy Department and the environmental agency over who should be blamed for the pollution problems and how quickly cleanup should procede. Last year, the Energy Department estimated that the cost of cleaning up pollution dating to development of the atomic bomb in the 1940's would be $100 billion or more.

**'Matter of Public Record'**

The announcement of the investigation was unusual because Attorney General Dick Thornburgh has in recent days expressed outrage at unauthorized disclosures to news organizations about preliminary investigations of public officials.

Mr. Thornburgh said he was announcing the Rocky Flats inquiry because "the search will be a matter of public record, and, second, I believe it is absolutely essential that the public understand that this investigation does not signal any major new environmental safety or health concern."

A spokesman for Secretary Watkins said the department had agreed to cooperate fully.

Officials said the investigation was limited to Rocky Flats, one of 17 principal nuclear weapons sites in 12 states with important environmental deficiencies.

The Energy Department and Rockwell have been questioned for years about pollution at the 11-square-mile site. Last October the plant was shut for five months after an accident in which three workers were exposed to radioactive contamination. In December, Rockwell paid $47,500 in fines for violating Federal pollution laws that regulate disposal of toxic chemicals.

## How did workers dispose of radioactive waste?

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Patrick J. Etchart, a spokesman for Rockwell at Rocky Flats, declined to comment on the allegations, except to say

that plant workers had been encouraged to cooperate with Federal agents..

**Sending a 'Shock Wave'**

Some environmentalists said the investigation was a positive step. "This will send a shock wave through the nuclear weapons complex," said Dan W. Reicher, a lawyer for the Natural Resources Defense Council, which monitors the nuclear industry's adherence to environmental laws. "It will cut to the heart of the problem, which has always been accountability."

WALL STREET JOURNAL June 7,
(los angeles)

# *Government's Nuclear Weapons Plant Near Denver Is Under Investigation*

By PAUL M. BARRETT And BARBARA ROSEWICZ
*Staff Reporters of The Wall Street Journal*

WASHINGTON -- The Justice Department launched a criminal investigation into possible illegal disposal of radioactive waste and concealment of hazardous contamination at the government's Rocky Flats Nuclear Weapons Plant near Denver.

The investigation of the plant, operated by Rockwell International Corp. under a contract with the Energy Department, "is the first of its kind at a government facility of this type," said Michael Norton, the U.S. attorney for Colorado, who is helping supervise the probe.

Mr. Norton said "it is natural to assume" that the targets of the investigation include employees of Rockwell and the Energy Department who work at the 6,500-acre plant. But the prosecutor refused to elaborate and said "it is very premature to consider whether criminal charges will ultimately be brought."

The investigation, which began more than a year ago, became public yesterday when about 70 agents from the Federal Bureau of Investigation, along with federal environmental and energy investigators, began a search at the Rocky Flats facility 16 miles northwest of Denver. Prosecutors in Denver also opened a grand jury inquiry of the plant's operation.

Attorney General Dick Thornburgh, in a prepared statement, said he had "taken the highly unusual step" of disclosing the investigation and grand jury probe in part to assure the public that the government action "does not signal any major new environmental safety or health concern."

Officials of Los Angeles-based Rockwell referred inquiries to the Energy Department, which issued a

statement that it will fully cooperate with the investigation. "I have stated repeatedly that it is my intention to operate DOE facilties fully in compliance with pertinent statutes," said Energy Secretary James Watkins.

Prosecutors said the investigation came in response to evidence of possible environmental violations at Rocky Flats contained in submissions that plant employees made to the U.S. Environmental Protection Agency and the Colorado Health Department. Mr. Norton said he couldn't elaborate on other sources of allegations under investigation because they are under court seal. The investigation will last at least six more months, prosecutors said.

The specific allegations now under investigation include illegal disposal of radioactive and other hazardous wastes; the discharge into ground water of pollutants without a permit or in excess of permit limits; and concealment of the alleged contamination from federal and Colorado authorities.

Federal agents yesterday also began a search of an Energy Department office in Albuquerque, N.M., which supervises the Rocky Flats plant.

Prosecutors declined to comment on whether criminal investigations are under way at the 16 other government nuclear weapons plants overseen by the Energy Department. The Bush administration is now examining how to begin cleaning up radioactive and hazardous wastes that are contaminating the sites. The government has estimated it could cost more than $100 billion over the next several decades to clean up the mess.

LOS ANGELES TIMES June 7, 1989

# Nuclear Weapons Plant Target of Federal Raid

## Scores of Agents Descend on Facility Near Denver in Probe of Management of Radioactive Wastes

DENVER—Nearly 100 federal agents clad in protective clothing raided the sprawling Rocky Flats nuclear weapons plant Tuesday as the Justice Department launched its first criminal investigation of such a facility.

Officials refused to say what triggered the probe, but a statement issued by the Justice Department in Washington, D.C., said it focuses on the storage, treatment and disposal of hazardous and radioactive wastes "in the past."

Atty. Gen. Dick Thornburgh stressed that it "does not signal any major new environmental safety or health concern."

Agents from the FBI and Environmental Protection Agency arrived at the Department of Energy facility at 9 a.m. to seize an undisclosed number of records, conduct sampling and interview employees, said Bob Pence, agent in charge of the FBI in Colorado.

### No Arrests Made

There were no arrests and no part of the plant was shut down, authorities said.

Agents also searched the Albuquerque operations office of the Department of Energy, which oversees the Rocky Flats plant.

There was no immediate comment from officials at Rocky Flats, which manufactures plutonium triggers on a 6,500-acre site 16 miles northwest of Denver. The facility, which employs about 6,000 people, has been operated by Rockwell International for the government since 1975.

"They won't tell us what the specific allegations are," said Richard Marquez, spokesman for the DOE's Albuquerque office. He said the search warrant did not name any individuals.

A spokesman at Rockwell headquarters in El Segundo, Calif., said only that the company was cooperating fully and that "this came as a surprise to us."

Pence said the raid followed a two-year joint investigation by the FBI and EPA.

"We're just getting started," he said in a telephone interview, adding that the FBI "will maintain our presence in the plant on a 24-hour basis."

**Extensive Probe Expected**

The search was expected to take approximately 10 days, but the Justice Department said the investigation itself would take six months to a year before any decision is made about filing charges. A federal grand jury inquiry into the plant operations also was under way in Denver, Thornburgh said.

The Justice Department said the specific allegations include "unpermitted treatment, storage and disposal of hazardous and mixed radioactive and hazardous wastes; the discharge of pollutants without a permit or in excess of permit limits; false certification of federal environmental reporting requirements, and concealment of environmental contamination."

The statement said it was "too early in the investigation to say who is a target.

"The investigation conducted thus far suggests that environmental violations are occurring, but we will need to assess the results of this search and conduct further investigation to better determine whether that is in fact the case, and, if so, who is responsible."

The Justice Department said that national security was not jeopardized because the search "is directed toward documents dealing with, and physical sampling of, hazardous waste—not the highly sensitive manufacturing and production processes but rather what is done with the hazardous wastes that are created."

David Runkle, an assistant attorney general at the Justice Department, confirmed that it was the government's first criminal investigation of a nuclear facility.

Pence said special precautions were taken for the agents who descended on Rocky Flats. All underwent medical examinations and attended safety and health lectures beforehand, he said, adding that "everyone is wearing special clothing" to protect against possible contamination.

Colorado's Democratic governor, Roy Romer, complained that he was caught flat-footed by the raid, which he first learned about Tuesday afternoon.

After twice touring the controversial plant in the past to look at employee safety procedures, Romer said, "I felt that there were some mistakes in the past but was under the impression that they had been cleared up.

"Today, I have to say to the people: 'Wait a minute, I don't know.'"

Rocky Flats has been dogged by criticism and controversy over the past decade. Earlier this week, the Sierra Club filed suit over environmental concerns relating to the plant's incinerators.

"Production concerns have been elevated over public health concerns, and there have been serious problems handling radioactive waste there," said Tom Bernard of the anti-nuclear Colorado Peace Network.

Safety violations closed the plant's main plutonium reprocessing building for four months last October. A December report by the Department of Energy listed 32 new safety problems and concluded that ground water contamination at Rocky Flats was the greatest single environmental hazard at any DOE facility.

Just last month, Congress was asked to finance a study to determine whether there is a link between pollution from Rocky Flats and cancer cases or birth defects in metropolitan Denver. The city has a population of about 2 million.

The proximity of the plant to the metropolitan area also became a key issue last year when boxcars of radioactive waste backed up at Rocky Flats when the state of Idaho refused to accept any more shipments until the federal government set a date for opening a permanent disposal site in Carlsbad, N.M.

**Lab Near Chatsworth**

A Department of Energy official said Tuesday the probe does not appear to extend to Rockwell's Santa Susana Field Laboratory just west of Chatsworth, where the company for more than three decades has done nuclear power research for the government. The Department of Energy has documented chemical and radioactive pollution problems at the lab two miles southeast of Simi Valley, and recent news reports alleged that environmental officials weren't fully informed about waste disposal practices at the site.

Unlike Rocky Flats, there is no data showing that contamination ~~at Santa~~ Susana has migrated off site.

**Staff writers Robert L. Jackson in Washington, Myron Levin in Los Angeles and researcher Lisa Romaine in Denver contributed to this article.**

Arvada Sentinel – June 7, 1989 – Page 21

# FBI, EPA open investigation of Rocky Flats nuclear plant

By Nan O'Neal

More than 70 FBI agents and other investigators searched the Rocky Flats nuclear weapons plant yesterday for evidence of possible criminal violations of environmental laws at the nuclear weapons plant.

At the same time, a grand jury investigation into environmental contamination at the plant was opened in Denver.

"The purpose of our investigation is to determine what, if any, criminal violations may have occurred in the storage, treatment and disposal of hazardous wastes and mixed hazardous and radioactive wastes at the Rocky Flats facility in the past," said Attorney General Dick Thornburgh.

The investigation involves alleged violations of clean air and water laws and possible false certification of federal reports and concealment of contamination.

Seventy FBI agents and agents from the Environmental Protection Agency's Office of Criminal Investigations and representatives of the Department of Energy's Inspector General entered the plant with a search warrant at 9 a.m. Tuesday. The search is expected to take 10 days.

Rocky Flats is operated by Rockwell International for the Department of Energy, and produces plutonium triggers for nuclear bombs.

Agents also began a search of DOE's Albuquerque operations office, which supervises Rocky Flats operations.

Thornburgh said the investigation "does not signal any major new environmental safety or health concern," but is being conducted in response to allegations of environmental contamination that have circulated for some time and have been investigated before by the General Accounting Office, the investigative arm of Congress.

Thornburgh said DOE Secretary James Watkins is

cooperating with the investigation and has committed his department to the cleanup of any environmental hazard that may be found at the plant.

U.S. Attorney Michael Norton said his office was brought in after a year-long investigation by the FBI and EPA and that his investigation will take another six months.

Norton said more evidence is needed to determine who is responsible for possible violations.

"It is too early in the investigation to say who is a target (of the investigation).

"The investigation conducted thus far suggests that environmental violations are occurring," Norton said.

Specific allegations include prohibited treatment, storage and disposal of radioactive and other hazardous waste; polluting with a permit or in excess of permitted limits; false certification of federal environmental reporting requirements; and concealment of environmental contamination.

The U.S. Attorney also asked a federal court to halt a Sierra Club suit against DOE and Rockwell International while the investigation is under way.

Norton said the investigation will not affect national security as it deals with waste, not production of weapons parts.

The Rocky Flats plant will remain open during the investigation.

Rocky Flats officials refused to comment on the investigation.

Page 4 – June 8, 1989 – Westminster Sentinel

# FBI opens investigation of Rocky Flats

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Broomfield Enterprise

June 8, 1989

# FBI OPENS INVESTIGATION OF ROCKY FLATS

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*see ROCKY FLATS, Page 4*

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Rocky Flats officials refused to comment on the investigation.

Saturday, June 10, 1989 Austin American-Statesman A3

# HAZARDOUS WASTE BURNED ILLEGALLY

## FBI DOCUMENT SHOWS ROCKY FLATS VIOLATIONS

DENVER (AP)—Aerial infrared surveillance showed hazardous waste being illegally burned at the Rocky Flats nuclear weapons plant, according to an FBI affidavit unsealed Friday in this week's federal raid on the facility.

The affidavit also accused Rocky Flats operators of illegally discharging pollutants into two creeks that flow into water supplies serving four metropolitan cities and of unpermitted dumping of hazardous waste.

U.S. Magistrate Hilbert Schauer unsealed the affidavit after a newspaper challenged withholding of the information that led Schauer to issue a search warrant for the raid Tuesday on the plant 16 miles northwest of Denver.

The 116-page affidavit catalogs the allegations made by FBI agent Jon Lipsky and indicates the investigation into possible criminal violations of hazardous waste laws will review activities at the nuclear weapons plant going back to November 1980.

Rocky Flats is operated by Rockwell International Corp. for the Department of Energy. The plant makes plutonium triggers for nuclear weapons.

The affidavit also questions the Energy Department's decision to award an $8.6 million bonus to Rockwell for excellent management of Rocky Flats.

On Tuesday, 75 FBI and Environmental Protection Agency agents raided Rocky Flats. On Wednesday, the Colorado Department of Health announced it had found 25 environmental violations at the plant.

The affidavit revealed that the FBI conducted aerial infrared surveillance at the plant on three nights in December to determine whether the incinerator in a plutonium reprocessing building that was closed for safety

violations was being illegally operated. They found that it was. Building 771 had been closed by DOE inspectors in October. It reopened in January.

The affidavit went on to say that there was probable cause to believe Rockwell and Energy Department officials in November 1985 falsely certified that Rocky Flats was in compliance with all applicable ground water monitoring requirements under the 1976 Resource Conservation and Recovery Act.

"In fact, various Rockwell and DOE officials were aware of serious contamination and were informed that the monitoring system was deficient and did not comply with the RCRA," the affidavit said.

INVESTIGATION AT ROCKY FLATS

# Rocky Flats illegally burned, dumped waste, U.S. claim

**By Bruce Finley**
**and Thomas Graf**
**Denver Post Staff Writers**

The Rocky Flats nuclear weapons plant illegally burned waste in incinerators and dumped material into streams for years and may still be doing so today, a U.S. Justice Department affidavit alleges.

In the 116-page affidavit released yesterday, federal agents say that even after one Rocky Flats incinerator was announced to have been shut down last fall, operators were burning radioactive materials at night.

Other allegations are that plant operators delivered millions of pounds of hazardous waste—some of it mixed with radioactive plutonium and some not—to dumps around the country without proper permits. Investigators also say Rocky Flats officials underreported waste production, and falsified documents to hide environmental crimes.

The affidavit was filed to obtain the search warrant federal investigators used to gain access this week to the 6,550-acre U.S. Department of Energy plant, located about 16 miles northwest of downtown Denver. The plant is operated by Rockwell International.

Scores of federal agents are searching Rocky Flats, where plutonium is processed for use in nuclear weapons.

In the affidavit, officials say they have cause to believe "that Rocky Flats is using an outdated and unpermitted incinerator in Building 771," a facility for processing plutonium, "to illegally 'treat' at least nine hazardous or mixed wastes in violation of the Resource Conservation and Recovery Act."

"Mixed waste" refers to a blend of radioactive and

otherwise hazardous material.

The waste allegedly was being burned in December 1988, when the U.S. Environmental Protection Agency and the public were told that the building was shut down, the affidavit added.

FBI nighttime surveillance flights in December, using infrared cameras, provided evidence that the Building 771 incinerator was being used to burn waste, the affidavit said.

Federal agents also allege several unreported discharges of hazardous waste into streams at the plant in November and December 1988. Those discharges went "into creeks crossing the Rocky Flats property and leading to metropolitan Denver drinking water supplies, which contained chemical pollutants not authorized by Rocky Flats' (Clean Water Act) permit," the document said.

Analysis of one water sample taken from Walnut Creek on Nov. 16 provided evidence of contamination with unexplained medical waste, according to the affidavit.

Rocky Flats, which makes triggers to detonate nuclear weapons, reported in 1985 that it generated an estimated 31.6 million pounds of 35 to 40 different types of hazardous and mixed waste per year. Some of that waste, the affidavit alleges, was sent illegally to various dumps that lack federal environmental permits.

Another group of allegations concerns false statements and concealment to "keep the public from knowing just how really bad the site is," said the affidavit, which refers frequently to memos obtained from Energy Department employees.

There is probable cause to believe that Rockwell and (Energy Department) officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination," the affidavit said.

Also, the affidavit said, "false statements and concealment of material facts have occurred" at the plant.

The investigation also is looking into whether

performance bonuses were paid to Rockwell based on falsified evaluations.

In May 1987 the Energy Department awarded Rockwell a performance bonus of about $8.6 million based on the department's ratings of Rocky Flats' health and safety standards as "very good" and Rockwell management as "excellent," the affidavit said.

That money was awarded even though a 1986 Energy Department memorandum had concluded that Rocky Flats "in poor condition generally in terms of environmental compliance" and that some of its waste facilities were "patently illegal" the affidavit said.

## HAZARDOUS WASTES PRODUCED

Listed below are some of the wastes generated by Rocky Flats, the quantity in pounds the plant claims to have produced each year, and how officials say they stored or disposed of each type of material.

- Intercepted pond seepage (chloroform, trichloroethane) — 29,129,284 pounds; physical chemical process.
- **Acid wastes** — 1,627,890 pounds; drums, tanks.
- **Pond sludge** — 848,232 pounds; drums.
- **Chromic acid** — 28,565 pounds; containers and tanks.
- **Coolant** (trichloroethane) — 9,691 pounds; drums; tanks and incineration.
- **Etchant solution** (10 percent acid) — 7,798 pounds; drums, tanks.
- **Oil contaminated with solvents** — 6,405 pounds; drums, tanks.
- **Sodium hydroxide** — 2,997 pounds; drums, tanks;
- **Cadmium cyanide** — 2,684 pounds; drums, physical chemical process.
- **Sulfuric acid** — 2,033 pounds; tanks.
- **Salts** (sodium nitrated potassium, nitrate mixture) — 1,196 pounds; drums, physical chemical process

- **Metal heat treating salts** (barium chloride) — 998 pounds; drums, physical chemical process.
- **Pyradine** — 276 pounds, drums.
- **Fixer** (radiographic solutions) — 237 pounds; drums, physical chemical process.
- **Ox out** (spent cyanide) — 154 pounds; drums, tanks.
- **Cyanide waste** — 22 pounds; drums, physical chemical process.

Sat., June 10, 1989, Denver, Colo.
Rocky Mountain News – 7

TROUBLE AT ROCKY FLATS

# FBI: Flats Burned Waste Secretly

By SUE LINDSAY and JANET DAY
Rocky Mountain News Staff Writers

FBI agents took infrared aerial photographs over the Rocky Flats nuclear weapons plant last December to show illegal hazardous waste incineration in a building previously ordered shut down for safety problems, according to documents released yesterday.

The unsealed affidavit that triggered Tuesday's raid on the plant details a massive two-year investigation of waste disposal at the Jefferson County facility.

In the document, the FBI also reports finding dangerous chemicals flowing from the plant into nearby creeks that drain into public water supplies.

Gov. Roy Romer said yesterday, "We need to check out every allegation that is in this document. If it (the plant) can't meet criteria for health and safety, we close it down."

The 116-page affidavit indicates that the investigation dubbed "Operation Desert Glow" will review activities at the plant dating back to November 1980. Two former Rocky Flats employees were sources of information for the investigation, the document said.

The records search is expected to last at least through next week, said Bob Pence, agent in charge of the Colorado FBI office.

U.S. Magistrate Hilbert Schauer unsealed the affidavit after a challenge was made Wednesday by the *Rocky Mountain News*. The document provided the basis for a search warrant issued by Schauer to the FBI and Environmental Protection Agency, triggering Tuesday's raid on the plant by 75 federal agents and dozens of EPA investigators.

"It's obvious that the federal government needs to get its act together," Romer said yesterday. "It's incredible that one agency of the federal government is sending an investigative team to check out the other. Let's hope it doesn't go as far as the Chinese army."

In addition to illegal incineration, the affidavit details:

✓ Illegal dumping of chemicals and experimental medical waste into drinking water supplies on Nov. 15 and 19.

✓ Falsifying records submitted to state health officials and the Environmental Protection Agency in 1985 and 1986. The records claim Rocky Flats complied with groundwater regulations.

✓ Using an old waste pond in December, 10 days after EPA denied a request to use the pond.

✓ Improper mixing of chemical and radioactive wastes in 1985.

✓ Ongoing improper storage that could lead to a build up of explosive hydrogen gas.

✓ Illegal disposal of hazardous materials through the plant's sewage treatment plant.

Rocky Flats is operated by Rockwell International Corp. for the Department of Energy. The plant, 16 miles northwest of Denver, makes plutonium triggers that detonate nuclear bombs.

Plant officials yesterday referred calls to DOE in Washington. Energy Department officials yesterday were reviewing the document and don't expect to have any comment until next week, said Chris Sankey, agency spokeswoman.

"If the allegations are true, the Department of Energy has a much larger problem than an impact on their credibility," said Melinda Kassen of the Environmental Defenses Fund in Boulder. "We're talking about alleged criminal activities which if

See FLATS, page 36

**FLATS**/from page 7

this were a private company, would result in its immediate shutdown.

"We are talking about activities that deserve jail sentences," said Kassen, also a member of the governor's Rocky Flats Environmental Monitoring Council. We're talking about plant officials who believe they're outside the law."

Both DOE and Rockwell, if convicted, would face fines of at least $25,000 per day per violation. If company or agency officials are implicated, they would face prison sentences as well.

The affidavit revealed the FBI carried out infrared surveillance flights at the plant on three nights last December to determine whether the incinerator was being illegally operated, and found that it was. At the time, Building 771 had been closed by DOE inspectors since October. It reopened in January.

"**EPA EXPERTS** in infrared photographic interpretation from the Environmental Monitoring Systems Lab in Las Vegas, Nev. have interpreted the FBI aerial photography and confirm that the Building 771 incinerator stack was thermally active on the nights of December 9, 10 and 15, 1988," the affidavit said.

EPA officials for years have tried to gain authority over operations in the incinerator building and continue to worry about what is being burned inside, said Jim Scherer, EPA regional director in Denver.

DOE officials claim operations involving plutonium are secret because of the threat to national security.

Investigators also believe waste may have been burned in another incinerator plant officials said was mothballed last year. That incinerator was designed to burn mixed chemical and low-level radioactive waste, but never permitted to open after widespread public opposition.

Burning chemical waste without proper controls could spew suspected cancer-causing dioxins and plutonium into the metropolitan area.

FBI agent Jon Lipsky, who wrote the affidavit, said he believed waste was being improperly stored or burned because the amount of waste generated at the plant exceeded its storage space. In 1984, the plant generated nearly twice the waste it had estimated could be stored or treated.

FBI agents also observed suspected cancer-causing chemicals and experimental medical waste flowing into Walnut Creek on Nov. 15 and 16. The creek runs through the Rocky Flats property toward Great Western Reservoir, past of Broomfield's waste supply.

In December, FBI surveillance revealed illegal discharges from the Rocky Flats sewage treatment plant to Woman Creek on three days. Woman Creek flows into Standley Lake, the source of water for Thornton, Northglenn and Westminster.

According to an EPA analysis, much of the contamination was medical waste from a research laboratory at the plant. Three chemicals are considered experimental—two are used to follow migration of radioactive materials in groundwater and one has been tested for its ability to prevent cellular damage from radiation.

"What kind of experimentation is going on out there on people? They don't need those types of chemicals to make (weapons parts)," said Maggie Fox, southwest regional director for the Sierra Club. "People downstream end up drinking some serious chemicals."

Investigators and health officials say the investigation does not indicate any immediate health threat to workers or nearby residents.

"The Department of Energy and the Department of Justice confirmed to me today that they have not yet found

anything in their investigation which is indicative of an ongoing threat to health," Romer said.

But environmental groups claim the water pollution and incineration are dangerous and the plant should be shut down.

FBI agents also are looking into various allegations that Rockwell and DOE made false statements to state and federal officials. In one instance in November 1985, officials claimed that Rocky Flats was in compliance with groundwater monitoring requirements when they knew the system was deficient and were aware of serious contamination, the affidavit states.

The *Rocky Mountain News* yesterday reported that the General Accounting Office also has launched an investigation of performance bonuses awarded Rocky Flats' managers.

GAO investigators will study an $8.6 million bonus from DOE to Rockwell for its "excellent" management at Rocky Flats in May 1987. The bonus was awarded despite other DOE findings that some waste facilities were "patently illegal," that Rockwell had significant problems controlling radioactive contamination and that Rockwell had given DOE erroneous and incomplete reports on environmental, health and safety matters.

A DOE memo in July 1986 stated that Rocky Flats was "in poor condition generally in terms of environmental compliance," that its permit applications were "grossly deficient," the affidavit said.

The DOE memo also described its efforts to keep the public from knowing "just how really bad the site is."

The affidavit quoted Raymond Romatowski, former manager of DOE's Albuquerque operations office which oversees Rocky Flats, advising DOE's acting secretary for defense programs in 1987 that DOE should "send a message to EPA that DOE and its management contractors are willing to 'go to the mat' " in opposing enforcement action at

DOE facilities," the affidavit said.

**THE GAO** investigation was the third blow sustained by the facility this week.

In addition to the raid by FBI and EPA agents, the plant also came under fire Wednesday from the Colorado Department of Health, which announced it had found 25 environmental and procedural violations at the plant.

FBI agents also raided the Albuquerque office this week to gather documents which may show how far up the chain of command illegal waste disposal was condoned.

Saturday, June 10, 1989 DAILY CAMERA

# Flats charges include illegal waste burning

Document claims chemicals put in creeks feeding water supplies

By RUSTY PIERCE
Camera Staff Writer

Rocky Flats employees illegally burned waste at night, dumped chemical waste and sewage into creeks that feed public water supplies, illegally stored waste and lied to cover up everything.

Those are the allegations in the affidavit that backs up the massive FBI investigation this week at Rocky Flats nuclear weapons plant, eight miles south of Boulder. The affidavit was unsealed Friday.

FBI agents flew over the plant at night and used infrared photography to uncover some of the alleged violations, according to the affidavit.

The nighttime flights revealed that an older incinerator in Building 771 was used to burn waste during the nights of Dec. 9, 10 and 15. A follow-up flight in February indicated that the incinerator probably was burning waste again. The affidavit reveals that a newer incinerator may have been used to burn wastes, even though Rocky Flats did not have a permit.

The infrared photographs also indicated thermal activity "forming a path from Rocky Flats' sewage treatment plant to Woman Creek." That thermal activity has been interpreted by the Environmental Protection Agency as liquid discharges from the sewage treatment plant into Woman Creek.

Woman Creek feeds Standley Lake, which holds the water supply for Westminster, Thornton and Northglenn. Those discharges are not allowed by any of Rocky Flats' permits.

The infrared photography also indicated that hazardous

wastes were present in two ponds on the Flats property.

Agents also installed water monitoring devices on properties adjacent to Rocky Flats to monitor the plant's discharges into Walnut and Woman creeks.

On Nov. 15, agents determined that chemicals had been discharged into Walnut Creek that feeds Great Western Reservoir, the water supply for Broomfield.

On Nov. 16, a chemical that has "been experimentally tested concerning its ability to protect against radiation-induced cellular damage" was found in trace amounts in Walnut Creek.

Two of the other detected compounds have been used experimentally in attempting to follow the migration of radioactive materials in ground water,

(See ROCKY, Page 5A)

(From Page 1A)

the affidavit stated. The plant failed to report that the discharges into those creeks contained the pollutants, and the discharges violated the Clean Water Act, the affidavit stated.

Two discharges into Walnut Creek and Woman Creek on Nov. 25 also went unreported, the affidavit revealed.

The affidavit states that Rocky Flats generates 35 to 40 hazardous or mixed wastes that are sent for "final disposal" to on-site facilities that do not have Resource Conservation and Recovery Act permits or interim status.

"The knowing treatment, storage or disposal of hazardous or mixed wastes without a permit or interim status is a RCRA felony," the affidavit states. The violations are punishable by up to $25,000 for each day the plant commits violations.

Part of the investigation involved an enormous paper chase in which documents, applications and reports from the plant were compared to one another.

Paperwork indicated that the plant generated 13,000 pounds of hazardous wastes in 1983 but that only 5,207

pounds, or "less than half the total amount indicated," were shipped to a facility or stored. "Disposal of the remaining wastes was not indicated," the affidavit stated.

A revised RCRA application in 1985 revealed that Rocky Flats annually generates more than 31.6 million pounds of mixed hazardous wastes.

The affidavit also alleges that Rockwell and Department of Energy officials have knowingly and falsely stated the plant's compliance with environmental laws and regulations and have concealed Rocky Flats' contamination.

"Consistent with their efforts to keep the public from knowing 'just how really bad the site is,' a July 1986 DOE memorandum said, 'There is probable cause to believe Rockwell and DOE officials have knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination,' " the affidavit said.

In a DOE memorandum dated Nov. 13, 1987, Raymond Romatowski, manager of the DOE's Albuquerque Operations office, said DOE should resist the efforts of environmental and public health authorities trying to clean up Rocky Flats and other DOE facilities. He suggested they send a message to the EPA that DOE and its management contractors are willing "to go to the mat" in opposing enforcement actions at DOE facilities.

A DOE memorandum stated in July 1986 that Rocky Flats was "in poor condition generally in terms of environmental compliance, that its permit applications were 'grossly deficient' and that some of its waste facilities were 'patently illegal,' " the affidavit states.

Yet in May 1987, DOE awarded Rockwell an $8.6 million performance bonus, based on Rockwell's "alleged 'excellent' management at Rocky Flats," the affidavit states.

The DOE will not comment on the affidavit or its allegations because a criminal investigation is pending.

DOE has sent a special independent investigation team to Rocky Flats and the team has "not found any condition or

situation which presents an imminent danger to the public's health or safety."

BROOMFIELD HOTLINE

Broomfield residents with questions about the safety of their water can call city officials this morning on a special telephone hotline.

City officials say they carefully monitor their water supply, which is fed by a creek that passes through the Rocky Flats nuclear weapons plant. Details and assurance are available by talking this morning to top city administrators, council members and the city's chemist.

The hotline, 469-3304, will be open from 8:30 a.m. to noon.

## Romer says he'll close plant if it's unsafe

**Associated Press**

DENVER—Gov. Roy Romer said Friday if the Rocky Flats nuclear weapons plant cannot meet criteria for health and safety he will close it down, but he rejected demands from activists that the plant be closed immediately.

Romer held a news conference to discuss a federal affidavit that accused the U.S. Department of Energy of serious health violations at the plant that included the dumping of hazardous wastes into the water supplies of Northglenn, Westminster and Broomfield, and the illegal burning of hazardous and radioactive wastes using uncertified incinerators. "We need to check out every allegation that is in this document," Romer said.

"If it (the plant) can't meet criteria for health and safety, we close it down," he said, but added, "A government memo is not a fact."

Rep. David Skaggs, D-Colo., whose 2nd District takes in the Rocky Flats plant, was more philosophical about the plant and its continued operation.

He said he is "re-examining the question" of whether the

plant should be shut down immediately. But it would be "premature to draw any conclusions about allegations."

He was pleased the plant's operators are cooperating with the investigation, he said and noted nothing has been found to indicate there is an immediate health danger.

The revelations in the FBI affidavit "reinforces my view ... that the Department of Energy and its contractors are inherently unsuited to police themselves in these sensitive areas." Skaggs said.

Sen. Tim Wirth, D-Colo., said the release of the affidavit means "the era of DOE's refusal to accept outside review is over."

## ALLEGATIONS AT-A-GLANCE

The affidavit, filed for the Rocky Flats [illegible] alleges:

■ Illegal treatment, storage and disposal of hazardous and toxic wastes without a permit or interim status under the Resource Conservation and Recovery Act.

The plant generated at least [illegible] 40 hazardous an mixed wastes that are sent for final disposal to various on-site facilities which do not have permits or interim status under RCRA.

■ Use of an outdated and unpermitted incinerator in Building 771 to treat at least some hazardous and mixed wastes in violation of the Resource Conservation and Recovery Act.

■ Illegal discharge of pollutants into Walnut and Woman creeks.

On Nov. 15 and 16, Rocky Flats discharged various chemicals into Walnut Creek. On three days in December, FBI surveillance revealed, discharges from Rocky Flats sewage treatment plant into Woman Creek.

Woman Creek feeds Standley Lake, the water supply for Westminster, Northglenn, and Thornton. Walnut Creek drainage flows into the Great Western Reservoir, a water supply for Broomfield.

■ False statements and concealment on the part of Rockwell and Department of Energy officials who have "knowingly and falsely stated Rocky Flats' compliance with environmental laws and regulations and concealed Rocky Flats' serious contamination."

The alleged false statements and concealment include:

■ Officials falsely certifying in November 1985 that Rocky Flats complied with ground water monitoring requirements when they knew that the monitoring system was deficient and there was serious contamination.

■ Rockwell providing the Department of Energy with erroneous and incomplete reports on environmental health

and safety matters. DOE awarded Rockwell a perform-

(See ALLEGATIONS, Page 5A)

(From Page 1A)

ance bonus of $8.5 million in May 1987 for Rockwell's alleged "excellent" management at Rocky Flats.

- Rocky Flats officials failing to report two discharges from the plant into Walnut Creek on Nov. 15 and Nov. 16, 1988.
- Rocky Flats also failing to disclose three illegal discharges in December 1988 from the plant's sewage treatment facility into Woman Creek on three days in December 1988.
- The plant's Building 771 incinerator was used to treat or dispose of hazardous or mixed wastes, contrary to public statements that Building 771 was shut down from October to late January.

*– Rusty Pierce*

PAGE 6 - WESTWORD - JUNE 21-27

ROCKY FLATS ROUND-UP
CITY LIMITS

## THE STATE KNEW IT—AND BLEW IT

Gov. Roy Romer could barely contain his anger when he learned the state hadn't been told of an undercover FBI investigation at Rocky Flats. "I am outraged by the possibility that some possible criminal act has occurred at Rocky Flats that may have endangered the population of this area," he said on June 6, the day the probe was disclosed.

But it wouldn't have been difficult for Romer to read all about criminal acts at the nuclear weapons plant. There's plenty of evidence in a spot where Romer has easy access: the state health department.

That's where the FBI obtained most of its information.

Although its investigation lasted nearly two years, the FBI didn't come up with much that hadn't already been collected by the Colorado Department of Health (CDH) and the Environmental Protection Agency.

Not that there isn't a lot of evidence in those files. Regulators at both the EPA and CDH knew Rocky Flats had been illegally disposing hazardous wastes for almost a decade. The agencies had the authority to impose hefty fines and shut the plant down. They did neither.

Finally, the FBI stepped in and seventy-five agents raided the plant. But would that have been necessary if regulators had been more aggressive?

A joint EPA and CDH inspection in 1983 established that Rockwell International, which operates Rocky Flats under contract with the Department of Energy, had been storing and disposing hazardous waste without the required permit since at least 1981. Plant managers had insisted a permit wasn't necessary because the waste fell below the minimum amount requiring a permit, and none of it was stored longer than ninety days. The inspection revealed

both claims were false—and Rockwell knew it.

The EPA demanded Rockwell file for a permit, and the company finally complied. Its application indicated Rocky Flats produced 13,000 pounds of hazardous waste annually, and that about 5,200 pounds were tucked away to a licensed disposal site. The application didn't mention what happened to the rest of the waste.

In 1984, the state health department assumed primary responsibility for monitoring hazardous waste disposal at Rocky Flats. Its enforcement tool was identical to the feds': a $25,000-a-day fine for each violation.

The CDH demanded a waste-disposal permit application from Rockwell, too. This time, plant managers estimated Rocky Flats produced 31.6 million pounds of hazardous and radioactive waste each year.

But Rockwell had failed to disclose all sources of waste material on the 1985 application, and the CDH determined it was incomplete. The department issued a deficiency notice. When Rockwell failed to respond adequately, CDH regulators threatened to deny the permit application and shut the plant down.

For months Rockwell and DOE officials argued that Rocky Flats, a federal facility, was exempt from the state's authority. But in 1986, they signed an agreement to comply with state hazardous waste regulations and submit a new permit application.

A 1987 CDH inspection disclosed fourteen violations, including inaccurately designating some hazardous waste as non-hazardous, and disposing of it in a Rocky Flats landfill designated for non-hazardous materials. The CDH again issued a notice of deficiencies, threatening to deny the permit application if conditions weren't corrected.

Most weren't. In May 1988, the state health department charged Rockwell with nine violations of hazardous waste laws and the '86 compliance agreement. Other violations were found during inspections in June, November and December of last year, including leaking drums, inadequate

waste analysis and incomplete identification of waste containers. CDH notified Rockwell of these violations in January, and in March told plant managers it would deny parts of the latest permit application because Rockwell had failed to provide adequate information. But the state didn't announce its decision to impose penalties on the plant until June 7—the day after the FBI raid.

A similar pattern of know-something/do-nothing appears in the state's handling of groundwater contamination. As early as 1985, regulators knew the plant was illegally fouling the groundwater, and that Rockwell had knowingly misrepresented its protection measures.

Today, Rockwell still doesn't have a permit to dispose of hazardous waste at Rocky Flats. The CDH has yet to determine the dollar amount of the 1988 penalties, let alone the violations announced earlier this month. Nor has it sought court approval to impose those penalties, as required by Colorado law. All the state has done is pursue settlement talks with Rockwell.

Except for violations of PCB regulations that resulted in a $47,500 penalty, the EPA hasn't imposed any fines on Rockwell, either—even though the agency's responsible for enforcing clean water laws and Rockwell managers have disclosed at least five illegal discharges into creeks that cross Rocky Flats since 1986.

Had the CDH and EPA levied penalties, Rockwell's balance sheet wouldn't have suffered; the DOE allows contractors managing federal facilities to be reimbursed for any fines they incur. But at least the fines would have alerted the DOE—not to mention Romer—to major problems at the plant.

David Shelton, director of CDH's hazardous waste division for the past two years, says the delay in getting a permit in place for Rocky Flats isn't unusual.

"The fact that it has lagged as long as it has is unfortunate," he says. "But with the people and resources we've got, we can't do things any faster. I can't put a team

of five or six people on this full time. The people handling it are the same ones who have to do the inspections and respond to citizen complaints."

A substantial hike in fees paid by regulated industries would provide more funds for enforcement, but Shelton thinks that's unlikely given the anti-tax sentiment that dominates the legislature.

Denver environmentalist Adrienne Anderson, who directs the new federal installation toxics project for the National Toxics Campaign, says the state health department isn't serious about using what resources it has to enforce environmental laws. During the year that ended last September 30, she says, the CDH collected only $25,175 in fines, although it knew of twenty-seven different situations involving multiple instances of illegal pollution that could have resulted in penalties of $25,000 per violation per day.

The CDH and EPA "act as booster clubs for the major polluters in the area, particularly the major military or energy department facilities such as Rocky Flats, the Rocky Mountain Arsenal [run by the Army] and Martin Marietta [which contracts with the Air Force]," Anderson charges.

Jim Stone agrees. A Rocky Flats engineer until he was laid off in 1986, Stone contends he was fired for pestering managers about unsafe working conditions. He's suing Rockwell, alleging breach of contract.

Rocky Flats' management was so inept that nearby residents risked environmental contamination, Stone says. But he saw no point in going to the EPA with his complaint. There was no indication of any oversight from them," he says. "I would have gone to them if they'd shown any interest, but they didn't."

Later that year, a friend suggested Stone approach the FBI. As it happened, the bureau had an agent stationed in Denver who specialized in environmental enforcement. Jon Lipsky met with Stone and William Smith, an agent with the EPA's criminal enforcement division.

Nearly two years later, Lipsky summarized the evidence of illegal dumping and burning of hazardous waste in a 116-page affidavit he filed to get a court order to search Rocky Flats for additional evidence. None of the information in the affidavit came from current or former Rocky Flats employees; most can be found in CDH and EPA files. Lipsky reported that he'd interviewed two former Rocky Flats workers, but only to determine the locations of records agents wanted to find during their search.

It's possible ex-employees provided information that isn't disclosed in the affidavit. But all of the allegations in Stone's suit against Rockwell concern hazards facing Rooky Flats workers, and Lipsky hasn't investigated those.

Stone did, however, provide the FBI agent with a July 14, 1986, memo addressed to a DOE assistant secretary in which the author says Rocky Flats "is in poor condition generally in terms of environmental compliance," that some of its permit applications are "grossly deficient," and that the '86 agreement reached with the EPA and CDH "has taken attention away from just how bad the site really is."

Lipsky's affidavit quotes this DOE memo extensively, although it doesn't indicate the author. Stone says it was written by a DOE lawyer and hints he received it from a current or former Rockwell employee.

The memo fueled Lipsky's interest in possible criminal activity at Rocky Flats and may even have triggered his investigation. Tom Speicher of the EPA's regional counsel office won't comment on the Rocky Flats probe, but says there's no specific formula dictating when a civil enforcement action becomes a criminal investigation. Although criminal convictions don't carry larger fines, the defendants could be sent to jail for up to two years for each violation.

Criminal charges require establishing "knowing" violations, but the EPA and CDH have had evidence of that at Rocky Flats since 1983. "If the health department had been enforcing the law we passed in this state, we wouldn't

have seen the level of extreme action we're seeing with the FBI probe," Anderson says.

Once he started his investigation, Lipsky quickly found evidence of numerous "knowing" violations in EPA and CDH files. In the affidavit, the only new information uncovered by the FBI was the apparently illegal use of an incinerator and evaporation ponds during three days last December (discovered through the use of infrared equipment on an airplane flown over Rocky Flats), three instances of dumping treated sewage and six instances of dumping hazardous waste into creeks that cross the plant, documented with infrared equipment and monitors just outside Rocky Flats property.

But the CDH and EPA had known since at least 1985 that Rockwell's numbers didn't add up. That should have clued them in that the rest of the waste was going *somewhere.*

And regulators should have been aware of some of the illegal discharges. Two of the three detected by the FBI in November were disclosed by Rockwell in a monthly report submitted to the EPA on December 19. Those same reports had disclosed five other illegal dumpings since March 1987, but the EPA never imposed fines.

But it's not clear if regulators even read the reports they received from Rockwell.

Stone wouldn't be surprised if they haven't. "They don't even read their own files," he says.

Neither, apparently, does Romer.

—Bryan Abas

# Ex-worker makes public $1 billion Rockwell suit

By Bill Scanlon
Camera Staff Writer

DENVER—A $1 billion lawsuit charging former Rocky Flats contractor Rockwell International with law-breaking and fraud was made public Tuesday, but the U.S. Justice Department has not agreed to join in the suit.

So, Rocky Flats whistleblower Jim Stone and his attorney Hartley David Alley will try alone to win their lawsuit, filed 16 months ago under the False Claims Act. Stone, who worked as an engineer at the nuclear weapons plant from 1980 to 1986, complained for years of safety problems and plutonium in the ductwork at the plant.

U.S. District Judge James Carrigan agreed to let the lawsuit go public this week, saying that if claims in it are true, they are of widespread public interest and shouldn't be sealed. U.S. attorneys in Washington, D.C., have asked for several extensions on their investigation of the merits of the lawsuit, saying that until recently they couldn't get their hands on documents seized in the June 1989 FBI raid of Rocky Flats.

Rockwell spokesman Jeff Charney said the company won't comment until it gets a chance to review the suit.

The lawsuit also charges that Rockwell knew it was breaking environmental laws, but didn't acknowledge it, es-

(See **ROCKWELL, Page 3A**)

## Rockwell lawsuit goes public

(from Page 1A)

pecially not when its bonuses were being considered.

Rockwell received $62 million in bonus awards from 1979 to 1988, including $16 million for doing better than expected in such areas as quality, production and environmental health and safety. Stone's lawsuit charges that Rockwell defrauded taxpayers—winning bonuses by being dishonest

about its compliance with environmental laws.

"Jim Stone is an individual who would not be silenced," Alley said at a news conference in Denver Tuesday.

In September 1989, consultants from an independent safety assessment team listened to Stone's allegations.

They concluded that managers should have investigated his contention that there may be plutonium in the air ducts. But they concluded that most of the rest of his allegations were unfounded, mostly because Stone wasn't privy to how things were done there.

Stone had quoted scuttlebutt from workers who said uncontrolled nuclear chain reactions, or criticalities, happened "all the time." But the team concluded a criticality never occurred at Rocky Flats and said the workers had been referring to safety infractions that could lead to a criticality, not a criticality itself.

"This is a bet-the-company case for Rockwell," said Alley. "We're in this for as long as it takes." Rockwell, a $12-billion-a-year corporation, earned a profit of $800 million last year.

"I was concerned at the unconscionable actions at Rocky Flats," said Stone. "I was angered they did not allow me to do my job. I want to set a precedent around the country. We want to give money back to taxpayers."

Friends and ex-colleagues of Stone say he is a sincere man who sometimes sees conspiracies when all they see are small problems.

Stone said he is not as frustrated today as he was a year ago when he was saying that lying and cheating by the U.S. government and its contractors was so endemic that the only recourse might be armed revolution. Stone said he wants to file similar suits to try to clean Rocky Mountain Arsenal, the Lowry Landfill, the old Colorado radium industry, the wastewater treatment plant in Brighton and the bubonic plague.

Last year, a Jefferson County District judge rejected his claim that he was wrongfully fired by Rocky Flats.

"I'm a crusader. I know I'm a nut for trying to do things right, to make companies accountable for their mistakes," he said. "I don't mind the term 'radical.' Not if it has to do with preserving the environment and people's health and safety."

Stone and Alley are setting up two hotlines, hoping to get workers, ex-workers and members of the public to share stories of fraud, waste and safety violations. The local number is 424-9749, the other (213) 383-4884.

## Many of Rocky Flats whistleblower's claims aren't new

By Bill Scanlon
Camera Staff Writer

The False Claims Act allows anyone with "original knowledge" of fraud to begin a lawsuit on behalf of the government.

That means a suit cannot be filed based on information found in the media or from a government hearing, report, audit or investigation.

Most of the claims in Rocky Flats whistleblower Jim Stone's $1 billion lawsuit against Rockwell International aren't new. They've been the subject of news articles, public hearings, admissions or lawsuits. They rehash the long-standing dispute over whether Rocky Flats should be covered by state environmental laws, and whether plant officials should have known that disposing waste without a permit would be deemed illegal.

But Stone is given credit by many for being among the first to claim that there was plutonium in the duct work.

"They said there couldn't possibly be plutonium in the ducts, but then they found it," Stone said Tuesday. Sixty-two pounds of plutonium is caked on several miles of

ductwork at the plant, which makes plutonium triggers for nuclear

(See **MANY, Page 3A**)

## Many of whistleblower's claims aren't new

(from Page 1A)

weapons.

Attorney Hartley Alley said if Rockwell had listened to Stone's warnings in 1980 when he was a utility engineer, plutonium never would have built up in the air ducts. And, if the U.S. Department of Energy had listened, Rockwell may have been thrown out as contractor nine years earlier. EG&G Inc. replaced Rockwell as the main Rocky Flats contractor late last year, following a dispute over liability for breaking environmental laws.

The False Claims Act allows citizens to sue contractors for fraud, waste and abuse, and to do it on behalf of the government—in effect inviting the Department of Justice to join in the action.

The Justice Department estimates that fraud drains $12 billion to $120 billion from the annual federal budget, according to Bradford Penney, former counsel to the U.S. Senate committee on Foreign Relations.

But the Justice Department joins a lawsuit only in about one in six cases, a fact that Penney thinks is caused because U.S. attorneys are stretched too thin.

Since 1986 when amendments made it easier for clients to win suits, all the settlements combined have totaled about $70 million. Stone would receive 15 percent to 30 percent of the settlement, with the rest going to the federal government. Stone would like to see that money churned back into Rocky Flats' cleanup.

The government this summer recovered $17.9 million from Textron, after it made faulty engines for Coast Guard helicopters. The citizen initiating the suit, former Textron

buyer Robert Ballew, received $2.7 million, tax-free.

From July through September, the government recovered $37 million from Martin-Mariettta, Ford Aerospace, General Electric and VSI Corp.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA ex rel.
James S. Stone,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

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**AFFIDAVIT OF JAMES S. STONE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

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STATE OF COLORADO )
: SS.:
COUNTY OF JEFFERSON)

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I am informed that defendant, Rockwell International Corporation ("Rockwell"), has filed a motion with the Court to dismiss my complaint on the ground that I allegedly am not an "original source" of the information on which my action is based. I further understand that, to be an "original source" under the False Claims Act, I must have direct and independent knowledge of information on which the allegations in this lawsuit are based. Because I have such knowledge and am an original source of the claims here, I submit this affidavit in opposition to Rockwell's motion.

**Background**

2. I am a registered professional engineer in several states including Colorado and had over 30 years engineering experience when I commenced my employment with Rockwell on November 10, 1980, as a Principal Engineer in Rockwell's Facilities, Engineering and Construction Division at the Rocky Flats Plant located in Golden, Colorado ("Rocky Flats"). In January of 1982, I was promoted to Lead Principal Engineer at Rocky Flats in the Utility Design Department, Facilities Engineering Division. I continued in that position until March 17, 1986, when my employment with Rockwell was terminated.

3. My duties during my six years at Rocky Flats included plant-wide "troubleshooting" and the review of designs and existing operations for safety and cost effectiveness. One of my main responsibilities was to identify plant engineering problems and recommend solutions to management. As a result, during my six-year tenure at Rocky Flats, I was assigned to numerous projects that required me to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. Each project that I worked on was identified by a project number and involved a variety of tasks. I attach as Exhibit A a copy of the daily records that I personally kept during my employment at Rocky Flats. These records show the variety of tasks I performed at Rocky Flats. Each task is identified by the overall project number, and a short description of the specific task. As my daily time records show, and as I explain in greater detail below, many of my assigned tasks related to the claims at issue in this case, as organized and set forth in my Consolidated Answers to Discovery, dated October 27, 1992, and attached as Exhibit B, *i.e.*, claims involving surface and ground water contamination and waste treatment, storage and disposal; plutonium contamination; and beryllium health and safety

issues.[14] In the discussion that follows, I have cross-referenced, where appropriate, the pertinent responses set forth in my Consolidated Answers.

**Ground and Surface Water Contamination and Waste Treatment, Storage and Disposal**

4. During my employment at Rocky Flats, I obtained direct and independent knowledge of a number of different ground and surface water pollution problems and problems related to waste treatment, storage and disposal. The problems I discuss below in this general area can be divided into the following three general categories: (1) sewage treatment system problems related to toxic waste disposal; (2) spray irrigation; and (3) pondcrete/saltcrete.

5. One of my first projects at Rocky Flats was to review the design of the sewage treatment plant. The sewage treatment plant at Rocky Flats was intended to process *only* routine biological wastes. Nevertheless, as part of this assignment, I learned that the flows to the sewage treatment plant contained materials which indicated the presence of industrial wastes as well as biological wastes. The industrial wastes at Rocky Flats are very toxic. They are hazardous or radioactive, or a mixture of both, and may be in liquid or solid form. These wastes are generated as part of the Rocky Flats production of nuclear bomb

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[14] For example, among others, project numbers 308201, 315300, 315332, 325040, 325041, 329670, 338616, 345242, 345244, 365550, 379200, 420129, 420906, 430139, 430211, 430555, 430576, 430707, 440227, 440414, 460014, 460912, 460913 and 470247 include tasks involving ground water contamination, sewage treatment, solar ponds and related waste treatment, storage and disposal issues; project numbers 325063, 328957, 335614, 338601, 338611, 345252, 348342, 360456, 370373, 378029, 388611, 398017, 398138, 400204, 410109, 410300, 410301, 420205, 420219, 420305, 430527, 430601, 430642, 430900, 438139, 440219, 470214, 470304, 490006 and 550499 include tasks relating to gloveboxes, dump valves and plutonium in the air duct exhaust system; and project numbers 310072, 318109, 325056, 328955, 365634, 450003, 450010, 450125, 450917, 450918 and 460552 include tasks involving health and safety issues affecting workers at the beryllium shop.

triggers and processing of nuclear materials. I learned of the presence of toxic wastes in the sewage treatment system when I reviewed certain records which reflected a low rate of biological process at the treatment plant and the presence of certain chemicals and metals, both of which indicated the presence of toxic waste. (*See* Exhibit B, Attachment 1, Items 7 & 17)

6. I concluded from this that the toxic wastes that should not have been present in the flows to the sewage treatment plant were killing the bacteria needed to process the biological waste at the sewage treatment plant. I also learned that many of the process buildings at Rocky Flats had laboratory sinks and floor drains that were connected to the drainage system to the sewage treatment plant. In my view, there also may have been broken lines and cross-connections between the toxic and biological waste disposal systems, and infiltration of contaminated ground water. Based on this, I concluded that the flows to the sewage treatment plant included toxic wastes from throughout the plant. (*See* Exhibit B, Attachment 1, Items 7 & 17; *see also id.*, Items 8, 9, 10 & 16)

7. The second general area of ground and surface water problems that I worked on at Rocky Flats had to do with the storage, treatment and disposal of both liquid industrial wastes from Rockwell's plutonium operations and the liquid wastes from the sewage treatment plant. At Rocky Flats, these wastes were sent to "holding" and/or "evaporation" ponds for storage, treatment, and disposal. The holding ponds primarily received the outflow from the sewage treatment plant; the evaporation ponds directly received the toxic industrial wastes from plutonium operations. When the ponds could no longer hold the full amount of these liquid wastes, Rockwell disposed of the wastes by a method called "spray irrigation." Spray irrigation involves the transfer of wastes from the ponds to the grounds of Rocky Flats.

8. The use of spray irrigation to dispose of wastes from

the evaporation ponds resulted in the disposal of highly toxic wastes directly on the ground. The use of spray irrigation to dispose of treated biological wastes, by contrast, would not ordinarily be a problem. At Rocky Flats, however, the use of spray irrigation from the holding ponds also was problematic because the wastes being spray irrigated were not solely biological wastes, but contained toxic materials. As stated earlier, the outflows from the sewage treatment plant contained toxic as well as biological wastes. Thus, Rockwell used spray irrigation to dispose of toxic wastes as well as biological wastes. (*See* Exhibit B, Attachment 1, Items 15 & 16)

9. Rockwell's improper use of spray irrigation also likely led to ground water contamination. Soil absorption and evaporation can only eliminate a certain quantity of liquid. If that quantity is exceeded, the liquid will enter and contaminate the ground water. The spray irrigated wastes also increased the ground water flow at Rocky Flats, specifically through former hazardous waste burial sites. This likely increased the rate of migration of these highly toxic wastes. (*See* Exhibit B, Attachment 1, Items 11, 15 & 16)

10. In addition, the method of spray irrigation employed by Rockwell at Rocky Flats caused the runoff of the wastes into the creeks that serviced the Great Western Reservoir and the towns surrounding Rocky Flats. Rockwell spray irrigated tremendous quantities of liquid on very limited areas regardless of temperature, precipitation or other climate factors. Because of this, the ground was unable to absorb all of the liquid and, thus, runoff of the wastes into the neighboring creeks likely occurred. This was evidenced by the erosion of the slopes at Rocky Flats which I personally observed. For example, spray irrigation of wastes onto eroded or frozen ground often causes the wastes to run into the surface streams which flowed into lakes that supplied drinking water to residents of the towns surrounding Rocky Flats. (*See* Exhibit B, Attachment 1,

Items 11 & 16)

11. I explained to Rockwell management that spray irrigation from the holding and evaporation ponds was resulting in toxic wastes being sprayed on the ground, which could contaminate the ground water and surface streams at Rocky Flats. I told management that I thought there was a better way to dispose of the waste products that Rockwell was then spray irrigating. On December 1, 1980, I put some of my recommendations for an alternative irrigation method in writing. That document is attached as Exhibit C.

12. Rockwell management did not accept my recommendations and instead continued to spray irrigate and, in my view, contaminate the surface and ground water. I continued to voice my concerns about spray irrigation. It was my opinion that, sooner or later, the toxic wastes would find themselves in the ground water and the reservoirs downstream of Rocky Flats. I continued to be concerned with the ground water problems at Rocky Flats. Several years after my initial recommendation, on March 20, 1984, in connection with my suggestion that Rockwell retain me as a full-time engineering consultant, I stated that the ground water problems at Rocky Flats were "a latent time bomb." I attach a copy of that document as Exhibit D. My recommendations were not heeded; Rockwell continued to spray irrigate as before.

13. During the course of my work, I also learned about a third major problem which I thought affected the surface and ground water at Rocky Flats and the surrounding towns. As noted earlier, toxic industrial wastes were sent to evaporation ponds at Rocky Flats. Some of the liquid portion of these wastes either evaporated or was disposed of by spray irrigation. The remaining liquid and some solid wastes, or "sludge," remained in the ponds.

14. This sludge and remaining liquid needed to be disposed of in a non-hazardous manner. In or about October 1982, I was assigned to a project addressing the proper

manufacturing process for "pondcrete." Pondcrete is a mixture of cement with the sludge and liquid from the evaporation ponds to form large blocks. The blocks can be stored at Rocky Flats or shipped to other sites for disposal. In forming these blocks, it is necessary that the mixture be such that the blocks are stable and do not fall apart and contaminate the surrounding environment. As assigned, I studied aspects of the design proposed by Rockwell management for making pondcrete. After careful study, I concluded that the suggested process would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment. I also noted, based on my knowledge of the chemical processes at Rocky Flats, that the sludge and liquid present in the evaporation ponds contained some of the most toxic and radioactive substances at Rocky Flats, which made the unstable nature of the pondcrete particularly hazardous. (*See* Exhibit B, Attachment 1, Items 2 & 3)

15. I communicated my concerns about pondcrete to Rockwell management. On October 13, 1982, I told my superiors that the suggested design would not work. A copy of that communication is attached as Exhibit E. As is noted at the bottom of that document, my superior, Bob Jensen, concurred in my opinion. Despite its knowledge that the pondcrete would not be' stable and that dangerous toxins would be released into the environment, Rockwell went forward with the project without making the changes necessary (some of which I proposed) to eliminate the instability of the pondcrete blocks.

16. Rockwell also decided to use a waste mixing process similar to that proposed for pondcrete for forming "saltcrete." Saltcrete is a mixture of cement, salts and salt brine from liquid industrial waste treatment processes that is formed into large blocks. I knew from my general knowledge of the process that, like the solid wastes being stored as pondcrete, the saltcrete blocks also would have problems with deterioration. The saltcrete and other

wastes were treated and stored at several sites at Rocky Flats in anticipation of being shipped off-site. (*See* Exhibit B, Attachment 1, Items 1 & 4; *see also id.*, Items 5, 6, 12, 13 & 14)

Plutonium

17. In or about 1982, I was asked to design a new exhaust "plenum" for a building at Rocky Flats which Rockwell intended to convert from a process building into an office building. A "plenum" is a duct or large chamber that collects air from the exhaust system before it leaves the building. A primary purpose of the plenum is to filter the air before it is released into the atmosphere. As part of my analysis of the proposed design for the exhaust system for this proposed new office building, I reviewed the designs and exhaust systems of other buildings at Rocky Flats.

18. While working on this project, I realized that some of the ductwork connected to the plenum was contaminated with radioactive wastes. I knew that the ductwork was over thirty years old, and deduced from that fact that numerous substances from different operations might have accumulated in the ducts. The presence of numerous toxins over the years, in my view, necessitated that the ducts be removed or cleaned. (Exhibit B, Attachment 2, Items 7, 8, 9, & 10)

19. I explained this problem to the project engineer. (Exhibit F) I also reviewed the records of the health and physics department, which confirmed my findings. (Exhibit G) I learned, however, that only the plenum, and not the ductwork, was to be cleaned. I recommended that Rockwell clean the ductwork as well. I suggested that Rockwell use new air filtration technologies, rather than replace the plenum, and use the saved money to clean the ductwork. (Exhibit H) My suggestions were not followed. The building was designated a "clean" building and occupied for office and laboratory space, even with the contaminated ductwork.

20. I also discovered that in some buildings that were

used for plutonium operations, "gloveboxes" used by employees working on plutonium and related safety features were not working properly. Plutonium is radioactive and one of the most highly toxic substances known to mankind. A "glovebox" is an enclosure into which workers place their hands to work on the processes using plutonium in the manufacture of nuclear bomb triggers. It is intended to prevent spontaneous combustion and unnecessary exposure to plutonium particles. The gloveboxes are connected through a filtered exhaust system to the ductwork which in turn is connected to the exhaust plenum. A properly functioning glovebox will, among other things, prevent over-pressurization and therefore prevent plutonium particles from entering the workplace. Gloveboxes are used at Rocky Flats because plutonium is extremely dangerous and radioactive. It is crucial to worker safety, and potentially to public safety, that the gloveboxes work properly and have adequate filters and other safety features.

21. I learned during my tenure at Rocky Flats that many of the gloveboxes being used by the workers were leaking. When this occurs, the plutonium particles enter the air and workers are unnecessarily exposed to the dangerous material. In addition, when the particles are airborne, additional plutonium may enter the exhaust ductwork that leads to the exhaust plenum. I also learned that the gloveboxes lacked necessary filters or the filters were punctured by workers trying to protect themselves because the filters were clogged from overuse and lack of maintenance. (*See* Exhibit B, Attachment 2, Items 1, 3, 5, 6, 8, 9 & 10)

22. In addition, the "dump" valves that were supposed to protect workers by maintaining the proper pressure in the gloveboxes were malfunctioning or not functioning at all. "Dump" valves are safety devices that protect workers from exposure to plutonium particles in the event the gloveboxes malfunction. The dump valve is supposed to open when there is too much pressure in the gloveboxes. When the

dump valves do not work, plutonium particles can leak into the workplace and create unnecessary hazards for workers. The malfunctioning of the dump valves also may lead to an accumulation of plutonium in the ductwork. (*See* Exhibit B, Attachment 2, Items 2, 8, 9 & 10.) While at Rocky Flats, I recommended a way to prevent damage due to over-pressurization from the dump valves. (Exhibit I)

23. When I became aware of the failure of the dump valves to work properly, I reported that fact to my superior, Anthony Eden. At Mr. Eden's suggestion, we tested the dump valves. The test results confirmed that the valves were not working properly and had not been working properly for some time. (Exhibit J)

24. Perhaps most importantly, as part of my assigned projects at Rocky Flats, I concluded that the build-up of plutonium in the exhaust ducts created a danger to occupants of the building as well as to persons outside of the building. As stated earlier, I learned from my work in the various buildings that the gloveboxes, filters and dump valves were not working properly and that the equipment being used by workers was not cleaned or changed often enough. These discoveries, in my view, proved that the malfunctioning equipment and ineffective safety devices in the buildings at Rocky Flats created serious hazards. I realized that plutonium particles had likely accumulated throughout the ductwork of other Rocky Flat process buildings. (*See* Exhibit B, Items 1, 8, 9 & 10; *see also id.*, Item 4) Despite my findings, Rockwell did not, to my knowledge, undertake the necessary actions to abate these very significant hazards.

**Beryllium**

25. Beryllium is a unique material used in the manufacture of nuclear triggers for nuclear bombs. It is an extremely toxic metal, although it is not itself radioactive. Workers who are exposed to dangerous levels of airborne beryllium can contract the deadly lung disease berylliosis.

26. During my tenure at Rocky Flats, I was assigned to

a Rockwell project team to study the health and safety conditions in the beryllium machine shop and propose solutions. I was given this assignment after an employee contracted berylliosis. As part of this assigned project, I examined the environment of the beryllium machine shop and reviewed Rockwell's compliance there with health and safety requirements. Attached as Exhibit K is a document that I prepared outlining the criteria for the design of the air handling system of the beryllium machine shop.

27. As part of this work, I learned that the workplace environment of the machine shop was contaminated with hazardous levels of beryllium both in the air and on workplace surfaces. I also learned that the systems in the shop for distributing air and for monitoring the level of beryllium exposure were not installed or functioning properly and that, therefore, Rockwell's records did not accurately reflect the excessive levels of beryllium particles in the shop. In addition, excessive levels of beryllium particles were accumulating in the wrong places in the dust collection system servicing the beryllium shops. I suggested to management that the monitoring system be corrected and that a different method of machining be employed at the shop to prevent-excessive beryllium particles from entering the air. Again, my suggestions were not heeded. (*See* Exhibit B, Attachment 3, Items 1-5)

**Rockwell's Contract with the United States**

28. As a Rockwell employee, I was aware that Rockwell was operating Rocky Flats under a lucrative contract with the United States. I understood then that, under its contract with the United States, Rockwell could and did earn substantial "bonuses" every six months for its operations of the plant. Indeed, periodically during my employment at Rocky Flats, I received copies of documents describing the award fee determination process under which Rockwell could earn these bonuses. I attach as Exhibit L one of the documents that I received while employed at

Rocky Flats which explains part of the process.

29. I also learned during my employment at Rocky Flats that, under its contract with the United States, Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. In addition, I learned that Rockwell's compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." In fact, page 2 of Exhibit L lists those performance areas that Rockwell had to satisfy in order to receive an award fee under the contract for the period in question. I understood, based on documents like Exhibit L, that Rockwell would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

**I Voluntarily Provided Information to the Government on Matters at Issue in This Case**

30. While employed at Rocky Flats, I was told by my superiors that I should not discuss the environmental, health and safety problems that I was discovering with representatives of the Department of Energy or any other agency of the government. I followed these instructions.

31. Soon after the termination of my employment with Rockwell in March 1986, I approached the Federal Bureau of Investigation ("FBI") about some of the environmental, health and safety problems described above as well as a number of other problems at Rocky Flats. I was introduced to FBI Special Agent Jon S. Lipsky by an acquaintance of mine, named Bonnie Exnor. I first met with Mr. Lipsky at Ms. Exnor's office in the summer or fall of 1986. At that initial meeting, I described some of the matters outlined above in addition to other matters concerning Rocky Flats that are not at issue in this case. I subsequently met on at least three other occasions with Mr. Lipsky and representatives of the Environmental Protection Agency

("EPA"), and on one occasion with an Assistant United States Attorney. I also spoke by telephone on several other occasions with Mr. Lipsky. In addition, I provided the FBI with over 2,300 pages of documents. Further, I provided the FBI with the names of individuals with likely knowledge of Rockwell's environmental, health and safety compliance activities as well as recommendations as to where at Rocky Flats the FBI might best locate additional relevant documents and other evidence.

32. To my knowledge, the FBI recorded some of our discussions. I had other discussions with the FBI that, to my knowledge, were not recorded, including my initial meeting in Ms. Exnor's office and some of my telephone conversations with Mr. Lipsky.

33. The FBI reports that I have of my discussions with representatives of the government document some, but not all, of the matters that I reported to them. I attach as Exhibit M a report by FBI Special Agent Jon S. Lipsky summarizing aspects of my June 25, 1987 meeting with Mr. Lipsky and EPA Agent William F. Smith. As that report indicates, during the June 1987 meeting I voluntarily provided information to the government concerning a number of matters on which this lawsuit is based, including matters involving ground water contamination, waste treatment and beryllium exposure.

34. I attach as Exhibit N an FBI report of my February 17, 1988 discussion with FBI Special Agent Lipsky, EPA Agent Smith and Assistant-United States Attorney Ken Fimberg. Among other things, at that meeting I discussed my safety concerns about the Rocky Flats beryllium shop and the contaminated ducts. In addition, I attach as Exhibit O further documentation by the FBI recording certain of our telephone conversations and written communications concerning matters at issue in this lawsuit.

35. All of the information that I provided to the FBI and other government representatives was based upon my

direct and independent knowledge, gained while I was an engineer at Rocky Flats working on matters that are now at issue in this lawsuit. I did not obtain the information outlined in this affidavit from news reports or reports of outside government investigations. Rather, I obtained the information outlined above by personal observation and in connection with my assigned projects at Rocky Flats to analyze these problems and propose solutions. The information I possess on the matters described in this affidavit is direct and independent of any public documents or news reports.

36. In August 1986, after the termination of my employment at Rockwell, I filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado. In that complaint, which I attach as Exhibit P, I included, among other things, some of the allegations concerning Rockwell's environmental violations involving wastewater, beryllium and plutonium (pp. 6, 9) that are presently at issue in this lawsuit (*see* Exhibit B).

37. Finally, simultaneously with the filing of this lawsuit, I submitted to the government a detailed Disclosure Statement. I attach as Exhibit Q a copy of my Confidential Disclosure Statement of Material Evidence and Information. As I state in that document (pp. 9-17, 19-20, 23-30), I voluntarily provided the government with information about which I had direct and independent knowledge on the surface and ground water, plutonium and beryllium allegations in this case. As the Disclosure Statement also states (pp. 24-30), I simultaneously provided the United States with four boxes of documents about matters at issue in this case about which I have direct and independent knowledge. I continued to supplement my Disclosure Statement by providing additional documentation to the government subsequent to its filing, and prior to the unsealing of this lawsuit.

38. In my Consolidated Answers to Discovery (Exhibit B), I summarized the factual bases of my claims in

this action. Based on my work history at Rockwell, as described in part above, I have direct, independent and personal knowledge of the facts underlying each of the environmental, health and safety problems set forth in my Consolidated Answers. The material outlined in this affidavit, however, is not all-inclusive of the matters about which I have direct, independent and personal knowledge from my employment at Rocky Flats.

**Conclusion**

39. For the foregoing reasons, I respectfully request that Rockwell's motion to dismiss my complaint be denied.

/s/ James S. Stone
James S. Stone

Sworn to before me this
27th day of February, 1993

/s/ Cynthia M. Annett
Notary Public
My commission expires February 24, 1996 [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

RECEIVED
OCT 29 1992

Case No. 89 C 1154

UNITED STATES OF AMERICA *ex rel.* and James S. Stone,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION, a corporation

Defendant.

## PLAINTIFFS' CONSOLIDATED ANSWERS AND RESPONSES TO DISCOVERY

The Plaintiff, James S. Stone, by and through their attorneys, HARTLEY DAVID ALLEY; BUCHANAN, GRAY, PURVIS AND SCHUETZE; McDERMOTT, HANSEN AND REILLY; and BREIT, BEST, RICHMAN AND BOSCH, P.C., pursuant to the direction of Bruce D. Pringle, United States Magistrate Judge, respectfully submits the Plaintiffs' Consolidated Answers and Responses to the Defendant's First Interrogatories and Request for Production. The Plaintiffs' Answers and Responses are attached hereto as Attachments 1, 2, 3 and 4.

This submission while not exhaustive as to the subject matter represents counsel's best effort to comply with the Magistrate's Order and is the product of substantial time and effort devoted to compiling this submission. Numerous documents are identified by category as opposed to identification with minute specificity. Upon the Defendant's

production of additional requested documents and Plaintiffs' counsel's opportunity to review requested documents, Plaintiffs will supplement these consolidated answers by providing greater precision in regard to documents endorsed generally here.

Further, while Plaintiff has listed individuals who may be knowledgeable in compliance with the Magistrate's Order, it is likewise believed this list is not exhaustive and that additional knowledgeable individuals may be identified either in documents provided in ongoing discovery or in depositions.

* * *

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
|---|---|---|---|---|
| ITEM 1<br><br>42 U.S.C. § 6928(d)<br>(2)(c)<br><br>Criminal<br>Count 1 | Rockwell knowingly stored saltcrete, a mixture of cement, salts, and salt brine, produced from building 374 liquid waste treatment processing operations, in violation of RCRA interim status regulations and Colorado Hazardous Waste Regulations 6 C.C.R. 1007-3 § 265.31, which required Rockwell to maintain its interim status facilities in such a way as to minimize the possibility of an | Plea Agreement 92-CR-107 | John McNett, Esq. | Contract AT (29-2)-3533, originally dated June 30, 1975, especially article XVII, P.56. This provision requires that the contractor (Rockwell) shall procure all necessary permits and abide by all applicable laws and regulations of the United States and of the state in which the work under the contract |

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|---|---|---|---|---|
| | unplanned sudden or non-sudden release of hazardous wastes to air, soil, or water..." Rockwell pled guilty to a felony violation of this statute in Count 1 of 92-CR-107, for knowingly storing saltcrete blocks on the 904 Pad on June 6-15, August 1-10, and December 5-14, 1988 and on June 1-10, 1989, and for knowingly storing saltcrete blocks on the 750 Pad on June 15-24, September 11-30, December 7-16, 1987, and February 15-24, May 6-25, July 18-27, September 14-23, 1988, and Febru- | | | is performed. Rockwell was not legally entitled to claim or receive payments for performance under this Contract if Rockwell's performance was not in compliance with its duties and obligations under the contract and in violation of the contract terms and of applicable laws and regulations, whether the payments were for purportedly "allowable costs" or a |

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|---|---|---|---|---|
| | ary 6–15, 1989.<br><br>Stone was an original source of information leading to the government's search of the RFP, and Stone had encouraged the FRI to check out the storage of pondcrete because he predicted, based upon his knowledge of the plan, that the mix would have an improperly high liquid content and the end product would be unstable and subject to deterioration. | | | "fixed fee", Or a "base fee", or an<br><br>* * * |

* * *

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
|---|---|---|---|---|
| ITEM 2<br><br>42 D.C.S. § 6928 (d) (2)(c)<br><br>Criminal Count 1 | Rockwell knowingly stored pondcrete, a hazardous waste mixture of cement and sludge from solar pond 207A in violation of RCRA Interim Status Regulations and Colorado Hazardous Waste Regu-lations 6 C.C.R. 1007–3 § 265.31, 6 C.C.R. 1007–3 § 265.173, 6 C.C.R. 1007–3, § 265.15(c), 6 C.C.R. 1007–3, § 265.171. Stone learned of the solar pond sludge removal conceptual plan from Fong and Eng. Stone spoke to | Plea Agreement 92–CR–107 | Leon Fong<br><br>Lou Eng<br><br>Rex Gaskins<br><br>J. Direcchi<br><br>M. Maas<br><br>Bob Jensen<br><br>John McNett, Esq. | See Item 1 |

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| | them also and expressed his concerns about the methodology selected and warned of erratic stability absent batching the pondcrete to establish the needed solidity of the product. As Stone warned, the product was frequently not solid and prone to deterioration. Rockwell pled guilty to a felony violation of this statute in Count 1 of 92–CR–107, for knowingly storing pond-crete blocks on the 750 Pad on June 15–24, September 11–30, December 7–16, 1987, February 15–24. May 6–25, July 18–27, September 14–23, 1988, | | | |

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| | and February 6–15, 1989, and for knowingly storing pondcrete blocks on the 904 Pad on June 6–15, August 1–10, and December 5–14, 1988 and June 1–10, 1989. | | | |
| ITEM 3<br><br>42 U.S.C. § 6928 (d) (2)(A)<br><br>Criminal Count 2 | Rockwell knowingly stored pondcrete, mixture of cement and solar evaporation pond sludge from solar pond 207A, without a RCRA Permit or Interim Status. Stone studied the concept for solar pond sludge removal (Stone Doc. 276) and informed Fong and Eng that the concept would not work as conceptualized. Stone was aware the project went | Stone Document 276<br><br>Plea Agreement 92–CR–107<br><br>All relevant documents re: Project #402096 | Leon Fong<br><br>Lou Eng<br><br>John McNett, Esq. | See Item 1 |

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| | forward anyway, despite his critique. Stone knew, from the plans which he saw, that the mixture would be unstable, i.e., too liquid. Rockwell pleaded guilty to felony violation of this statute in Count 2 of 12–CR–107 for knowingly storing pondcrete on the 904 Pad without a required RCRA Permit or Interim Status on October 5–9, November 16–20, and December 14–18, 1997, and January 18–22, February 22–26, March 21–25, April 18–22, and May 16–20, 1988. | | | |

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| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 7<br><br>33 U.S.C. § 1319(c) (1)(A)<br><br>Criminal Count 5 | Rockwell pled guilty criminal conduct in violating conditions and limitations of the RFP NPDES Permit dated November 26, 1984, by discharging and releasing toxic hazardous substances to RFP's sewage treatment plant on August 10-19, November 12-21, 1987 March 7-16, April 11-20, May 9-18, and November 9-18, 1988. This plea occurred in 92-CR-107. | Plea Agreement 92-CR-107 | John McNett, Esq. | See Item I. Contract AT (29-2) – 3533 originally dated June, 1975, and especially Article XVII, P. 56, Modification 2 thereof, especially ¶ 2-d (p. 18), Modification 87 thereof, especially ¶ 16 (p. 25). |

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| | This conduct is a continuation of conduct described in Items 16 and 17 below, which was described by Stone to the FBI commencing in 1987. | | | |
| ITEM 8<br><br>33 U.S.C. § 1319(c)(1)(A)<br><br>Criminal Count 6 | Rockwell pled guilty to criminal conduct in violating the RFP NPDES Permit by discharging water from the B-3 Pond which exceeded permit limits for 5-day Bio-logical Demand (BOD-5) and/or fecal coliform on March 1, 15, and 30, 1988. This plea occurred in 92-CR-107.<br><br>This conduct is continuation of conduct | Plea Agreement 92-CR-107 | John McNett, Esq. | See Items 1 and 7 |

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| | described in Item 16 below, which was described by Stone to the FBI commencing in 1987. | | | |
| ITEM 9<br><br>33 U.S.C. § 1319(c)(1)(A)<br><br>Criminal Count 7 | Rockwell pled guilty to criminal conduct in violating the RFP NPDES permit by discharging water from the B-3 Pond which violated the BOD-5 and fecal coliform limits on April 1, 8, 12, 16, 20, and 30, 1988. This plea occurred in 92-CR-107.<br><br>This conduct is continuation of conduct described in Item 16 below, which was described by Stone to the FBI commencing in 1987. | Plea Agreement 92-CR-107 | John McNett, Esq. | See Items 1 and 7 |

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| ITEM 10<br><br>33 U.S.C. § 1319(c)(1)(A)<br><br>Criminal Count 8 | Rockwell pled guilty to criminal conduct in violating the RFP NPDES Permit by discharging water from the B-3 Pond which violated the BOD-5 limits on May 1, 15, and 30, 1988. This plea occurred in 92-CR-107.<br><br>This conduct is continuation of conduct described in Item 16 below, which was described by Stone to the FBI commencing in 1987. | Plea Agreement 92-CR-107 | John McNett, Esq. | See Items 1 and 7 |

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 11<br><br>33 U.S.C. § 1319(c)(2)(A)<br><br>Criminal Count 9 | Rockwell pled guilty to the felony charge of knowingly violating the conditions and limitations of the RFP NFDES Permit by spray irrigating B-3 pond water contrary to good engineering practices and bypassing RFP facilities necessary to maintain compliance with the plants NPDES Permit at the discharge point from pond 8-3 to the B-4 Pond and was not controlled or monitored. | Plea Agreement 92-CR-107 | John McNett, Esq. | See Items 1 and 7 |

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| | Rockwell was aware that its spray irrigation practices irrigated more effluent from pond B-3 than the East Spray Field had capacity to properly dispose of by evaporation and infiltration. Rockwell spray irrigated when the spray fields were saturated, during sub-freezing temperature, at night, and while snow and ice were on the ground; Rockwell also spray irrigated over and adjacent to the waste disposal sites known as the East Trenches which contain approximately 275,000 pounds of Uranium- | | | |

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| | contaminated drums and volatile organic compounds, sending large quantities of waste water into the waste disposal area. This conduct occurred on May 18, June 19, July 9, 10, and 22, August 4, November 15, December 4, 8, 9, and 25, 1987; January 4, March 2, April 22, May 19-20, November 14, and December 2, 9, 15, and 27, 1988; January 7, February 1, 2, 8, 13, 20, and 25, March 4, 9, 28, and 30, April 11 and 21, May 10, 25, and 31, and June 5, 15, and 23, 1989. This plea occurred in 92-CR-107. This conduct is a | | | |

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| | continuation of conduct which Stone first observed in November, 1980, and continuously throughout his employment at RFP. | | | |

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| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 13<br><br>42 U.S.C. §6928 (d) (2) | Rockwell knowingly stored liquid hazardous waste, i.e., salt brine and solar pond sludge, in solar evaporation ponds 207 A, B, and C without RCRA Permit or Interim Status. This conduct was continuous, dating from prior to Stone's employment at RFP in November, 1980, and continuing until at least March, 1986, and perhaps later. Stone's knowledge of the constituents of the process waste stream | Stone Docs. #7 & #276<br><br>SAR for Bldg. #374<br><br>Quality Assurance Manual for Bldg. 374<br><br>Assay Sheets for Bldg. 374 Waste Slurry<br><br>Chemical Analyses of Salt | Rex Gaskins<br><br>Bob Jensen<br><br>Leon Fong<br><br>Sam Cerise<br><br>Al Krisnar<br><br>Chuck Rose | See Item 1 |

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| | from Building 374 is detailed in Item 12. Stone personally traced the process waste pipeline from Building 374 to the solar evaporation ponds in May and June, 1982, and thus confirmed what he had been told by Gaskins, Jensen, and perhaps others, about the outflow routing of the Building 374 liquid hazardous waste to the 207 solar evaporation ponds. Stone also studied mappings of nitrate leeching from the solar ponds, referenced as Stone Document #7.<br><br>Stone also learned of | Brine for the 207 Solar Ponds<br><br>Documents listed in Item 12<br><br>All relevant dots. Re: Job/Project #'s 900427, 420906, 338616, 315300, 900402, and 440414<br><br>C.E.A.R.P. Phase 1, April 1986, especially V.A.3.h, p. V-19 thereof<br><br>C.E.A.R.P., phase 2, July | |

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| | the functions of the solar evaporation ponds in discussions with Gaskins and Jensen commencing in November, 1980, and from Leon Fong in approximately October, 1982, when he studied materials concerning the solar evaporation pond sludge removal design criteria. During this period, Stone also learned that a trench system pumped pond leakage and contaminated groundwater back into the 207 ponds.<br><br>Stone reviewed chemical analysis of the salt brine and the Pond sludge | 1986, especially table 2.4 thereof | | |

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| | in the 207 solar evaporation ponds which confirmed that these ponds stored liquid hazardous waste as defined by RCRA. These documents were provided to Stone by Fong. Fong told Stone that the solar pond sludge was hazardous waste in October, 1982, which confirmed again what Stone had learned commending November, 1980, from written material described in the preceding item and in conversations described therein also. | | | |

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| Item 13<br><br>continued | Stone regularly observed the 207 solar evaporation ponds, and from his personal observations he could tell the ponds remained full despite evaporation uptake, indicating that replenishment was ongoing. Stone walks also aware that the only function of the 207 solar ponds, was to was to evaporate process waste, and that these ponds were the end point for | C.E.A.R.P., Appendix A, July 21, 1986, especially Tables IV, 1 and 3<br><br>Closure Plan, Solar ponds Evaporation Ponds, Aug. 29, 1986, especially . §1.2.2 thereof<br><br>Closure Plan, Solar | | |

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| | liquid process waste at RFP that was not otherwise stored or treated. Stone knew the basic production and treatment processes at the RFP did not change during his tenure, and that pipe routing remained the same. Stone personally inspected all aspects of the piping and process waste distribution system approximately once every three months throughout his employment at RFP and the process waste distribution system from and including the function of Building 374 to and including the 207 solar | Evaporation Ponds, July 1, 1988 | |

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| | ponds remained unchanged throughout Stone's employment at RFP.<br><br>From discussions with the long tenured employees at RFP listed and review of the described documents, Stone learned these process techniques have remained essentially unchanged for many years, all of which demonstrate the continuity and ongoing nature of the storage of salt brine and solar pond sludge in the 207 solar ponds. | | | |

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 14<br><br>42 U.S.C §6928(d)(2) | Rockwell knowingly treated liquid hazardous waste in solar evaporation ponds 207 A, B, and C, without a RCRA Permit or Interim Status. This conduct was continuous, dating from prior to Stone's employment at RFP in November, 1980 to at least March 1986, and likely later.<br><br>Stone's knowledge of some of thee sources of contribution to the 207 ponds is detailed in items | See documents listed in Item 13 | See individuals listed in Item 13 | See Item 1 |

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| | 12 and 13 above. Stone learned from these sources and others that one purpose of the solar evaporation ponds was to evaporate liquid process waste. This evaporation treatment process was continuous, in that the evaporation uptake was replenished constantly from Building 374 and other sources. A second function of the solar evaporation ponds 207 A, B, and C was settling of colloidal suspensions or precipitants within the liquid hazardous waste salt brine. This treatment process was also ongoing and | | | |

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| | continuous, and Stone regularly observed both of these processes operating throughout his employment at RFP. | | | |

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 15<br><br>42 U.S.C. §6928(d)(2) | Rockwell knowingly disposed of liquid hazardous waste, i.e., salt brine from 207 solar evaporation ponds A, B, and C. without a RCRA Permit or Interim Status by spray irrigation. Immediately after being employed in November, 1980, Stone, commenced work on dispersal pumping of salt brine from the 207 solar pond. to spray fields. On approximately December | All documents listed in Item 12 and 13<br><br>All relevant docs. re: Job/ Project #'s 900179, 315300, 315332, 900427, 420906, 338616, 900402, 440414<br><br>Stone document #'s 4 through 11, 410 | Bob Jensen<br><br>Chuck Rose<br><br>Sam Cerise<br><br>Bill Nichol<br><br>Leon Fong<br><br>Al Krisnar<br><br>Tony Eden | See Item 1 |

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| | 10, 1980, Stone told Jensen and Rose that it was clear from what he had read and studied that the spray fields pumping operation from the 207 ponds was putting hazardous waste on the ground. Stone raise the issue many times with Jensen and Carise, including noting the "time bomb" nature of the RFP groundwater problem (Stone doc. #410). He received no response. The pumping to west spray fields continued to operate through at least 1985, and ran virtually daily, pumping salt brine | US DOE Rocky Flats RFP. Repository<br>Document RP-938 re: West Spray Field as historic release point<br><br>Reconstruction of Historical Rocky Plats Operations & Identification of Release Points, Project Take 3& 4, Final Draft Report, by ChemRisk for the Colorado | | |

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| | which was sprayed on the ground. The system had begun in reduced fashion approximately the time Stone was hired at RFP, November, 1980, and was greatly expanded commencing approximately January, 1982. About once every three months throughout his employment at RFP Stone verified that the source of the west spray field salt brine was the 207 solar evaporation ponds.<br><br>The source of Stone's knowledge about the hazardous waste character of the salt brine | Department of Health, August 1992 | | |

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| | from the 207 solar ponds was detailed above in Items 12 and 13. | | | |

| STAT., REG., OR CONTRACT TERM VIOLATED | FACTUAL BASIS | DOCUMENTS | INDIVIDUALS | NEXUS |
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| ITEM 16<br><br>33 U.S.C. 51319(c) (2)(A) | Rockwell knowingly violated conditions and limitations of the RFP NPDES Permits by spray irrigating water from the B-4 pond and from the 207 ponds contrary to good engineering practices, without required monitoring and by by-passing monitoring facilities necessary to maintain compliance with the ATP NPDES Permit. This conduct was ongoing and | Stone Doc. #22 and #25<br><br>RFP Utility Dept. test records of STP flow and quality<br><br>Bldg. 881 lab test results of STP influent and effluent contamination<br><br>RFP Utility | Al Krisnar<br><br>Chuck Rose<br><br>Bob Jensen<br><br>Sam Cerise<br><br>Ken Shirk<br><br>Leon Tong<br><br>Tony Eden | See Items 1 and 7 |

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| | continuous from at least as early as 1981, and perhaps earlier, until the end of 1985, and perhaps later.<br><br>Stone's sources of knowledge as to the operation of the 207 Ponds is detailed in Items 12 and 13. In November, 1980, Stone commenced work on the nitrate waste irrigation project. During the course of this project, Stone learned from numerous source. that sewage treatment plant effluent was being pumped to Pond B-3 and then to the west spray field and sprayed on the | Dept. records of hazardous waste processing of STP sludge<br><br>All does. listed in Items 12, 13, and 15<br><br>C.E.A.R.P., phase 1, Installation Assessment April, 1986, especially §V.B.2.e. | | |

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| | ground. These sources were discussions with Krisnar, Nichol, Jensen, Cerise, and others, as well as Stone's review of RFP utility department re-cords of the sewage treatment plant sewage flow and sewage quality test results.<br><br>Stone found that documented BOD levels showed that the sewage treatment plant biological process was low, in-dicating a serious influent contamination problem was killing the bacteria which process biological waste at the RFP sewage treatment plant, and that | | | |

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| | the extraneous influent was approximately 50%.<br><br>Tests Conducted In the lab in Building 881 and at the sewage treatment plant showed clearly that there was high influent contamination problem, which Stone original attributed to broken sewage lines being infiltrated by process waste contaminated ground water. Stone reviewed RFP utility department records and learned that sewage treatment plant sludge was processed as hazardous waste. The lab reports Stone inspected from RFP Utility | | | |

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| | Department and Building 881 Lab, as well as numerous materials he inspected at the RFP Library, showed that there was a high affluent contamination problem. Stone reviewed RFP utility department records and learned that sewage treatment plant sludge was processed as hazardous waste. The lab reports Stone inspected from RFP Utility Department and the sewage treatment plant showed that the sludge was commonly found to contain process waste substances including chromium, cadmium, and | | | |

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| | other metals used in RFP operations. Despite Rockwell's knowledge of the character of the salt brine in the 207 evaporation ponds and the biological and process waste character of the liquid in the B-3 pond, Rockwell commenced spraying the west spray field utilizing liquid from each of these ponds. In so doing, Rockwell bypassed the B-3 pond outfall measurement necessary to maintain compliance with the RFP NPDES permit.<br><br>Stone personally reviewed the design criteria for Rockwell's | | | |

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| | nitrate waste's irrigation project. He pointed out to Rockwell evaporation uptake, he compared the spray irrigation concept to a disposal trenching system, and he proposed the disposal system be placed to the north of the plant, away from known hazardous waste burial sites. He pointed out to Krizner and Jensen that spraying pond 207 and pond B-3 liquid on the ground west of the plant would add to the groundwater, which prior studies had shown migrated west to east. Stone pointed out that | | | |

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| | adding to ground water flow would exacerbate the plant's groundwater problem as the enhanced groundwater flow would pass through the plant, where extensive hazardous waste burial sites were known to exist. Stone's plan was rejected, and liquid waste from pond 207 and B-3 was pumped to the west spray field and onto the ground. This spraying operated virtually continuously throughout Stone's tenure at RFP, placing substantially greater volumes of liquid waste on the west spray field | | | |

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| | than could be evaporated or disposed of by soil absorption or plant uptake and contaminating ground water. | | | |

JA-224

## ENGINEERING CALCULATION SHEET

PROJECT Nitrate Waste Irrigation — PROJECT NO 315332

BY Jim Stone

To: Al. Kriznak w/copy to Bob Jensen — DATE 12-1-80

CALCULATION:_____ — SHEET 1 of 3

[Handwritten Text]:

COMMENTS ON DESIGN CRITERIA:

1. THE IRRIGATION SYSTEM SHOULD BE LOCATED IN THE AREA NORTH OF THE 207 PONDS & THE PSZ FOR THE FOLLOWING REASONS:
   a) LESS ENERGY & COST DUE TO SHORTER DISTANCE BETWEEN SOURCE OF WASTEWATER & DISPOSAL AREA.
   b) THE AREA SHOULD BE CULTIVATED IN ORDER TO UTILIZE THE EXISTING NITROGEN TRAPED IN THE SUBSOIL & TO STABILIZE THE SLOPES AGAINST EROSION.
   c) THE AREA IS DOWN-GRADE FROM THE PONDS & CAN BE SERVED BY GRAVITY WITH A SIPHON SYSTEM.
   d) THE AREA IS DOWN-WIND FROM THE ROCKY FLATS FACILITY.
   e) THE AREA IS NOT SUITABLE FOR OTHER PURPOSES, SUCH AS FUTURE EXPANSION OF THE ROCKY FLATS FACILITY.
2. THE IRRIGATION SYSTEM SHOULD BE A GRAVITY FED DISPERSAL TRENCH SYSTEM FOR THE FOLLOWING REASONS:
   a) THE GEOLOGICAL FORMATION & THE SOIL TEXTURE IS SUITABLE FOR A SHALLOW TRENCH SYSTEM TO DISPERSE THE WASTEWATER INTO THE ROOT ZONE

UNIFORMLY.

b) THE SYSTEM CAN BE OPERATED YEAR-AROUND & IS MORE DEPENDABLE THAN A MECHANICAL SPRINKLER SYSTEM.

c) THE SYSTEM HAS LESS OWNING & OPERATING COSTS.

d) THE SYSTEM IS MORE ADAPTABLE TO THE UNIQUE WIND CONDITIONS AT ROCKY FLATS.

e) THE SYSTEM MEETS THE CRITERIA ESTABLISHED BY THE ENVIRONMENTAL & SAFEGUARDS/SECURITY DIVISIONS.

3. REFERENCES:

a) DRAWING – "NITRATE WASTE IRRIGATION #SK-315332-DC-1"

b) "A SUPPLEMENTARY REPORT TO AN ENGINEERING STUDY FOR WATER CONTROL & RECYCLE CONCERNING THE RECOVERY OF NITRATE LADEN GROUNDWATER" BY ENGINEERING-SCIENCE, INC.

c) "SOIL INVESTIGATION (PSZ)" BY CTL/THOMPSON, INC.

d) "20' WIND ROSE – ROCKY FLATS" BY AEC

e) "FREEZE INDEX – USE OF CLIMATIC DATA IN DESIGN OF SOILS TREATMENT SYSTEMS, BOULDER, CO." BY NO & AA

f) "DESIGN MANUAL – LAND TREATMENT" BY EPA 625/1-77-008

g) "CALCULATIONS – AREA REQ'D" BY J. STONE (SHTS 2 & 3)

JA-226

March 20, 1984

Sam Cerise, Manager
F.E. & C. Design Div.
Rockwell International

Dear Sam:

As a follow-up to our meeting on Monday morning and pursuant to a suggestion by my supervisor, Bob Jensen, I propose that you create a position for an in-house engineering consultant, under your direct supervision, and let me fill it. The work would include special studies, the review of A/E design work and technical assistance to design and project engineers.

An indication of the current need is as follows:

1. Emergency Engineering - these are not on the DPL:

a) Maintenance space needed in the L.A. shop by May 15, 1984.

b) B881 computer room cooling for this summer - S & W will not complete planned work until September 1984.

c) B123 contingency plan to keep the labs in operation. ARIX will not have the plans, much less the work, completed by this summer.

d) ECON projects to meet need for current fiscal expenditure:
B371 - Cooling of 11 control rooms
B443
B~~334~~ - Piping modification to test, gas valves.

e) Equipment purchases in less than the regular 120 days delivery.

2. "State of the Art" Engineering Concepts:

a) B707 Facility redundancy - we must be first in this competition.

b) Ground water control and utilization - this is a latent time bomb.

c) Product improvement by an alternate inert environment.

3. Review A/E Design Work - recent failures:

a) B123 HVAC work which omitted lab make-up air and heating.

b) B850 Fire Protection piping with design water velocity at 32 ft./sec.

4. Engineering man-hours and scope of work estimates for A/E negotiations in mechanical, chemical, civil and environmental engineering.

5. Interface between working engineers and computer technology in design and project scheduling in order to facilitate Jeff Haberl's work.

The above situations are only those which have occurred recently. They represent a great challenge and opportunity. I try to accommodate these needs between my regular duties, but we are losing ground. I should be on this full time. Thanks for your consideration.

/s/ James Stone

Stone 10-3-82

# ENGINEERING ORDER

| TYPE OF ACTION | REVIEW | FINAL |
|---|---|---|
| ENGINEERING DRAWINGS | ☐ | ☐ |
| CONCEP. DES. REPORT | ☐ | ☐ |
| DESIGN CRITERIA | ☒ | ☐ |
| REQUEST FOR DIRECTIVE | ☐ | ☐ |
| OTHER ( ) | ☐ | ☐ |
| PROCUREMENT SPECS. | ☐ | ☐ |
| DESIGN DOC.-TITLE I/II | ☐ | ☐ |
| **PROCUREMENT** | **IND** | **PURCH.** |
| SPECS. AND/OR DWGS | ☐ | ☐ |
| **CONSTRUCTION** | **ORIG.** | **ADDENDUM** |
| ISSUE | ☐ | ☐ |

FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O. ☐

OTHER ACTION SPECIFY ☐

**TYPE OF FUNDING**
LI ☐ GPP ☐ CEP ☐ WPAS ☐ EXP ☒

**TYPE OF CONSTRUCTION**
MAINT ☐ OPF ☒
FIXED PRICE CONTACT ☐

**QUALITY ASSURANCE LEVEL**
I, IA, (II, IIA, OR III) (CIRCLE ONE OR MORE)

**INSPECTION REQUIRED**
SOURCE YES ☒ NO ☐
RECEIVING YES ☒ NO ☐
CONSTRUCTION YES ☒ NO ☐

REFER TO EO NO.

EO RELEASE DATE 10-4-82

**INITIATOR** A. L. KRIZNAR EXT 69-2722 DATE 9/22/82

**PROJ. ENGR.** A. L. KRIZNAR EXT. DATE

**FUNCT. MGR.** R. J. Ruiz EXT. 2106 DATE 9-30-82

**F.O.A.** Al Watson EXT. DATE 9/29/82

**E.O. COORDINATOR** M. J. Quinn EXT. 2505 DATE 10-1-82 3:30 PM

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| INITIATOR | | 1 | 1 | 1 | |
| PROJ ENGR / AREA PROJ. ENGR | | | | | |
| PROJ MGR R. GASKINS | 770 | 1 | 1 | 1 | |
| MGR J. DIROCCHI | 770 | 1 | 1 | 1 | |
| MGR M. MAAS | 774 | 1 | 1 | 1 | |
| FAC MGR | | | | | |
| PD&A MGR | | 1 | 1 | 1 | |
| PE&C MGR | | 1 | 1 | 1 | |
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| MAINT AREA MGR | | | | | |
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| FAC PROJ ENGR MGR | | 1 | 1 | 1 | |
| CONST PROJ ENGR MGR | | 1 | 1 | 1 | |
| EQUIP PROJ ENGR MGR | | | | | |
| FAC DESIGN ENGR MGR | | 1 | 1 | 1 | |
| FAC ELEC DES MGR | | 1 | 1 | 1 | |
| ESCO DES MGR | | | | | |
| POWER ENGR | | 1 | 1 | 1 | |
| UTIL & CIVIL DES MGR | | 1 | 1 | 1 | |
| CHEM PROC DES MGR | | 1 | 1 | 1 | |
| LOW ENG | | 1 | 1 | 1 | |
| SOURCE INSPECTION | | | | | |
| RECEIVING INSPECTION | | | | | |
| ENERGY ENGR | | 1 | 1 | 1 | |
| DEN MGR (TRANS LTR ONLY) | | | | | |
| WASTE MGT MGR | | 1 | 1 | 1 | |
| BDT | | | | | |
| BLDG OPER DIR | | | | | |
| SEISMIC ANALYSIS | | | | | |
| INDUSTRIAL ENGR | | 1 | 1 | 1 | |
| FILTER SYS MGR | | | | | |
| AREA SAFETY REP | | | | | |
| TECHNICAL SECURITY | | | | | |
| EO COORDINATOR | | 1 | | | |
| TOTAL NO. OF COPIES | | 30 | 30 | 35 | |

**DESCRIPTION OF DOCUMENT(S)**

| DRAWING NO | ISSUE | TITLE |
|---|---|---|
| 27982-D01 | | P&ID |
| " -D02 | | P&ID |
| -D03 | | EQUIP LAYOUT |
| -D04 | | STRUCTURAL |
| -D05 | | MOTOR POWER PLAN |
| -D06 | | ONE LINE ELECT DIA. |

DESIGN CRITERIA REVIEW PACKAGE INCLUDING ABOVE DRAWINGS

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operations. See L. Fong or L. Eng for details of my objections & potential alternatives.
Jim Stone 10-13-82

☐ DISTRIBUTE PMR PER PMR DISTRIBUTION LIST

☐ REQUEST FOR ESTIMATE TO COST ENGRG. ONLY

INPLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIZNAR BLDG. LAKE ARBOR
BY THURSDAY OR BRING YOUR COMMENTS TO THE REVIEW MEETING
IN ROOM Conf Rm BLDG LAKE ARBOR TIME 1:00 PM DATE Fri. Oct. 14, 1982
REVIEWER'S SIGNATURE DATE 10-13-82

| CHARGE NO | SUFFIX NO. |
|---|---|
| 830 | |
| E.O. NO. | BLDG. NO. |
| 7864 | FAC. 207 |

| PROJ. NO. | SUB. NO | PAGE NO |
|---|---|---|
| 420906 | — | 1 OF 1 |

OJ. TLE SOLAR EVAP. POND SLUDGE REMOVAL

RF-48486 (11/81) DESTROY PREVIOUS ISSUES

0439

276



BEST AVAILABLE COPY

FROM TONY EDEN ☺

Stone
NAME

ANY HIGHLIGHTS SINCE LAST TUESDAY
1. PROBLEMS/SOLUTION

2. ACCOMPLISHMENTS

3. INFORMATION

4. TOP FIVE JOBS STATUS

PLEASE TURN THEM IN BY 3:30 PM
TUESDAY Oct. 1 '85
MONTH DATE

[Handwritten Text]:

1. In my opinion, you are wrong in your assessment of the need for the mini-pleat filter in the new B881 Exhaust Plenum. Your I.L. at Sept. 23, 1985 only expressed the negative aspects. I think that positive aspects should also have been presented. Please note that Rockwell lost the litigation today on low-level radiation contamination. Therefore the contaminated ducts in B881 represent an increased liability. The savings of several million dollars, by the use of the mini-pleat, would provide the funds to clean or replace these ducts.

2. I asked maintenance for a front partition to my reassigned office space. It is extremely difficult to concentrate while being exposed to an active main hallway.

3. This is a request to purchase a book—Static Electrifications. The RFP library will not extend my current loan, but give no reason.

4. I am currently working on Be proj. # 950012—Ingot Break-out Hoods.

5. This is to record my strong protest at the three-day suspension that I received last week. It is a strange system of justice that allows one of two participants in a rule infraction to be judge, jury & executioner. You may recall that you instigated the problem by stopping me in a public hallway with your remarks. You should have called me into your office. I responded in close proximity to you & in a low voice because I get muscle strictures to the point that I cannot even speak, when I am very angry. The "finger" gesture that I gave was in lieu of my shouting a reply to your continued remarks as I reached the end of the hallway. This situation was witnessed by at least four other people.

837

cc – G. Goles

[Handwritten Text]:

1. S&W may perform the decon work.

2. Radiation Monitoring has made a survey of the plenum. See attached survey sheet.

3. Levels of contamination acceptable after decontamination:

| | Removable | Total |
|---|---|---|
| $\alpha$ | <20 dpm/100 $cm^2$ | NDA |
| $\beta$ | < 1000 dpm/100 $cm^2$ | 5000 dpm/100 $cm^2$ |

4. No painting over contamination. This has been done too much in the past and only acts to create future problems. If necessary, the surfaces of the plenum should be scoured to removed the fixed contamination.

5. The entire area will be considered cold.

6. All work must be done in accordance with the rules and regulations as stated in the HS&E Manual, and as required for the job.

R.A. Miller
O.H.P.
5/6/85

676
666

**EMPLOYEE $UGGE$TION PROGRAM**

| Do not Write in this Block | Date Received | Suggestion No. 80297 |
|---|---|---|

| | (Last Name) (First Name) (Initial) | BLDG. | Dept Name | Employee Number | Shift |
|---|---|---|---|---|---|
| | Stone, James S. | LA02 | FE | 511396 | 1 |
| | **Job Title** | **Tele Ext.** | **Super-visor's Name** | **Tele Ext** | **Date** |
| | Principal Engineer | 2748 | A. Eden | 2742 | 10/3/85 |
| | **(Last Name) (First Name) (Initial)** | **BLDG.** | **Dept Name** | **Employee Number** | **Shift** |
| | None | | | | |

THE TITLE OR SUBJECT OF MY SUGGESTION:

**Contractors can profit from "Value Engineering" clause in contract.**

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

**PRESENT METHOD OR PROBLEM:** A contract was signed last week to build a new $5.6 million exhaust plenum in the roof of B 881. This contract contained the conventional "Value Engineering" clause, which says that the successful Contractor may submit "cost saving" suggestions and he will receive 50% of the savings from acceptable proposals.

**PROPOSED METHOD OR SOLUTION:** In this case, the Contractor may suggest that the design be changed to utilize the existing plenum in the basement with new high-rate HEPA filters used by European nuclear industry or

simply reduce the present structure size by approximately 58%. In either case the savings would be several million dollars and he would claim half. I am confident that the DOE would consider either proposal and may consider both in order to provide the needed funds to clean up existing contamination in this building and to promote the "Value Engineering" concept to help reduce the National debt. Rockwell and the DOE should establish a "Value Engineering" department.

---

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

**EMPLOYEE $UGGE$TION PROGRAM**

| Do not Write in this Block | Date Received | Suggestion No. 80293 |
|---|---|---|

| | (Last Name) (First Name) (Initial) | BLDG. | Dept Name | Employee Number | Shift |
|---|---|---|---|---|---|
| | Stone, James S. | LA02 | FE | 511396 | 1 |
| | **Job Title** | **Tele Ext.** | **Super-visor Name** | **Tele Ext** | **Date** |
| | Principal Engineer | 2748 | A. Eden | 2742 | 10/3/85 |
| | **(Last Name) (First Name) (Initial)** | **BLDG.** | **Dept Name** | **Employee Number** | **Shift** |
| | None | | | | |

THE TITLE OR SUBJECT OF MY SUGGESTION:

**Saving energy provides funds to improve environment in B 881.**

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

**PRESENT METHOD OR PROBLEM**: The current plan is to exhaust the entire building with a 350,000 cfm plenum installed on the roof, because the ductwork is contaminated and there are not sufficient funds in the current budget to clean or replace the ducts. B 881 has only a small laboratory with contaminated air (8000 cfm) to be exhausted in a non-recirculating HEPA filtered exhaust system.

**PROPOSED METHOD OR SOLUTION:** If the ducts were cleaned or replaced, then 98% of the air could be re-circulated end a small modular exhaust plenum could be utilized by the laboratory. Estimated value of energy

savings is $350,000/year. The estimated value of the reduced liability by eliminating contamination is incalculable.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

**EMPLOYEE $UGGE$TION PROGRAM**

| Do not Write in this Block | Date Received | Suggestion No. 80294 |
|---|---|---|

| | (Last Name) (First Name) (Initial) | BLDG. | Dept Name | Employee Number | Shift |
|---|---|---|---|---|---|
| | Stone, James S. | LA02 | FE | 511396 | 1 |
| | **Job Title** | **Tele Ext.** | **Super-visor Name** | **Tele Ext** | **Date** |
| | Principal Engineer | 2748 | A. Eden | 2742 | 10/3/85 |
| | **(Last Name) (First Name) (Initial)** | **BLDG.** | **Dept Name** | **Employee Number** | **Shift** |
| | None | | | | |

THE TITLE OR SUBJECT OF MY SUGGESTION:
**Application of new HEPA filters to save approximately $2 million/year in power costs at R.F.P.**

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

**PRESENT METHOD OR PROBLEM:** R.F.P. utilizes size 5 HEPA filters which are designed for 750 cfm at 1" w.c. (Clean) to 3" w.c. (dirty) pressure drop. There are from two to four stages in various operations with a total design pressure drop of 4" w.c. (2-stage) to 6" w.c. (4-stage). The pressure drop from HEPA filters represents from 65% to 75% of the total pressure drop in the exhaust system and is directly proportional to the fan HP required. The current electric power costs for the R.F.P. is approximately $7 million/year with approximately 60% chargeable to ventilation fan power.

**PROPOSED METHOD OR SOLUTION:** If the new

HEPA filters utilized by European nuclear industry were used, the power cost would be reduced approximately 58% for exhaust fans. This represents an annual savings of approximately $2 million/year. Since the physical dimensions are the same as the conventional #5 HEPA, there would be no retrofit cost. The new filters may cost a bit more initially, because the nuclear market is down in the U.S., but this incentive would soon create local competition.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

| /s/ James S. Stone | 10/3/85 | | |
|---|---|---|---|
| Suggester | Date | Co-Suggester | Date |

JA-238

**EMPLOYEE $UGGE$TION PROGRAM**

| Do not Write in this Block | Date Received | Suggestion No. 80295 |
|---|---|---|

| | (Last Name) (First Name) (Initial) | BLDG. | Dept Name | Employee Number | Shift |
|---|---|---|---|---|---|
| | Stone, James S. | LA02 | FE | 511396 | 1 |
| | **Job Title** Principal Engineer | **Tele Ext.** 2748 | **Super-visor Name** A. Eden | **Tele Ext** 2742 | **Date** 10/3/85 |
| | **(Last Name) (First Name) (Initial)** None | **BLDG.** | **Dept Name** | **Employee Number** | **Shift** |

THE TITLE OR SUBJECT OF MY SUGGESTION:
**Application of pre-filter has potential to extend life of HEPA filters fifty times.**

SEE REVERSE SIDE BEFORE COMPLETING OR MAILING THIS FORM

**PRESENT METHOD OR PROBLEM:** R.F.P. utilizes large exhaust plenums with de-mister section and HEPA filter stages. These filters are changed when they get dirty as indicated by the increased pressure drop and power consumption. This is a hazardous and expensive operation because air suits must be worn for the filter replacement operation.

**PROPOSED METHOD OR SOLUTION:** If pre-filter, at approximately 80% efficiency, were retrofitted to the back of the de-mister section, the increased pressure drop would be negligible, the change-out operation would be minimal and the life of the HEPA filters would be extended

approximately fifty times.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85 _____

Suggester Date Co-Suggester Date

JA-240

**EMPLOYEE $UGGE$TION PROGRAM**

| Do not Write in this Block | Date Received | Suggestion No. 80296 |
|---|---|---|

| | (Last Name) (First Name) (Initial) | BLDG. | Dept Name | Employee Number | Shift |
|---|---|---|---|---|---|
| | Stone, James S. | LA02 | FE | 511396 | 1 |
| | **Job Title** Principal Engineer | **Tele Ext.** 2748 | **Super-visor Name** A. Eden | **Tele Ext** 2742 | **Date** 10/3/85 |
| | **(Last Name) (First Name) (Initial)** None | **BLDG.** | **Dept Name** | **Employee Number** | **Shift** |

THE TITLE OR SUBJECT OF MY SUGGESTION:
**Application of new HEPA filters has potential to save over 50% of capital cost to build new exhaust planum for B 881.**

SEE REVERSE SIDE BEFORE COMPLETING
OR MAILING THIS FORM

**PRESENT METHOD OR PROBLEM:** A contract was signed last week to build a new 350,000 cfm exhaust plenum on the roof of B 881. The plenum is sized for 350,000 cfm and would utilize the R.F.P. conventional plenum design, with a de-mister section and two HEPA filter stages. The plenum is about 100' square and three stories high and was bid at $5.6 million.

**PROPOSED METHOD OR SOLUTION:** If the newer HEPA filter utilized by European nuclear industry were used, the air flow could be increased from 750 cfm/#5 HEPA to 1800 cfm/#5 HEPA. The physical size of the facility would be reduced approximately 60%, for a capital cost savings of

approximately $3 million. The air-flow capacity and fan horsepower would be the same; however, the operating cost would be reduced by the 2/3 reduction in floor area.

I have read the Policy and Rules on the reverse side of this form and my foregoing suggestion is submitted for consideration under the stated terms of the Company and Employee Suggestion Program. I understand and agree that if my suggestion is adopted, Rockwell International Corporation and its subsidiaries and the successors and assignees thereof, shall have the right to make full use same.

/s/ James S. Stone 10/3/85

Suggester Date Co-Suggester Date

Date 5-28-85 ROCKY FLATS PLANT
To Tony Eden
From Jim Stone MEMORANDA
"Say it in Writing"

MESSAGE:
If an ounce of prevention is worth a pound of cure, I have discovered a method of preventing over-pressure excursions from gloveboxes, as an alternative to the use of dump valves. Over-pressurization is caused by a malfunction in the supply mechanism for auxiliary gases. This malfunction may be a ruptured supply hose for compressed air or a frozen oxygen valve which may cause an explosion. The key is to limit any supply of an auxiliary gas. This can be accomplished by manually filling a small tank, that is properly sized to prevent over-pressurization or an explosive mixture even if the tank or supply mechanism failed. This is similar to the "day" tank oil supply for a diesel-electric generator operation. I will calculate the required parameters in the near future.

/s/ James S. Stone
Signature

JA-243

Internal Letter — Rockwell International

Date: June 28, 1985 — No

| TO | Name, Organization, Internet Address | FROM | Name, Organization, Internet Address, Phones |
|---|---|---|---|
| | - J.R. Handschy<br>- Industrial Safety<br>- T452D | | - A. Eden<br>- Facilities Engineering<br>- LA002<br>- 2742 |

SUBJECT - MODULATING/DUMP VALVES PROBLEM

On June 25, 1985, Bill McAndrew and Ken Sedlmayr tested in accordance with SMU-301 modulating and dump valves at Anderson Greenwood Co. facilities in Houston, Texas. During the course of these tests, they found the valves to maintain set pressures only at very low flow rates (less than 20% valve capacity), and at very high flow rates (near valve capacity). At the mid-range of valve capacity, which is normal operating range, the valves operated unacceptably. Therefore, glovebox pressure could swing from -4" to positive pressures. Consequently, the valves have failed the tests and should not be used to control glovebox pressures until a new valve is developed.

Purchasing is using SMU-301 to attempt to solicit new manufacturers, but past efforts to do this have not been successful. In the interim, I recommend we revert to the manual valving system.

/s/ Anthony Eden
A. Eden, Manager
Plant Utilities Engineering

cc:

S. E. Cerise
M. W. Corcoran
E. F. Ernst
L. Q. Fong
D. L. Gally
G. L. Hansen
J. L. Hebert
R. K. Jenkins
A. F. MacDonald
D. L. Marsh
L. A. Remley
C. R. Rose
L. M. Stoddard
V. Terkun

JA-245

Internal Letter — Rockwell International

Date: January 15, 1986 — No.

| To (Name, Organization, Internal Address) | FROM (Name, Organization, Internal Address, Phones) |
|---|---|
| - E. O'Neil<br>- Facilities Project Management<br>- Building 130 | - J. S. Stone<br>- Facilities Engineering<br>- LA002<br>- 2748 |

SUBJECT - PROJECT NO. 450918 - BE SHOP VENTILATION
COMMENTS RE MEETINGS OF 12/20/85, & 1/6/86, AND
REPLIES TO COMMENTS FROM REVIEW OF EDC ISSUED 12/10/85

The following review of FE-HVAC Policies may resolve some of the concerns expressed in the above reviews and establish the design parameters for the Be Exposure Control Projects.

1. All Class A (Pu) and Class B (Ur/Be) facilities will have the ventilation supply system designed for air flow control and the exhaust system designed for differential air pressure control.

2. All Class A and B facilities will have HVAC controls designed to be integrated with a future centralized Data Requisition and Control System.

3. All Class A and B facilities should have the air supply ionized to neutralize the static electricity

of airborne particles. This reduces the tendency of airborne particles to "plate-out" on room and duct surfaces and keeps them in suspension until they can be captured in the HEPA filter plenum.

4. All Class A and B facilities should have the ventilation air system designed for operating at seven air changes per hour (a.c./hr.) normally to conserve energy. The system should also have the capacity to operate at 15 a.c./hr. during an emergency to limit the spread of contamination and with item No. 3, to quickly remove and contain the contaminate.

5. All Class A and B facilities should control contamination first by "preventive measures" and secondly, by control as close to the source as possible. The main building filtration systems should be considered as backup insurance against any release of contaminants into the outside environment. The "close to the source" containment prevents spread and accumulation of contaminants within the building. This will necessitate the design of serviceable "dropout" boxes with pre-filters.

6. All glove boxes, machine hoods, lab hoods, etc. should have the ventilation system designed to control the optimum aerodynamic air flow within the enclosure and be provided with indicators to confirm the proper operation to the operator. This will necessitate the design of specific orifice plates for each different machine hood.

J. S. Stone
Plant Utilities Engineering

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we tan take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award tee. The award fee is based on superior performance in the group of key Functional Performance

Areas (FPAs) that DOE identifies for each 6-month CPAF evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (see attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

JA-249

# FUNCTIONAL PERFORMANCE AREAS
# ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT*

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance*
Production Support*
Chemical Operations*
Technical Support
Quality Control*
Development Work
Nuclear Materials Management
Waste Management*
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security*
Nuclear Safeguards*
Facilities Engineering & Construction Management
Facilities Maintenance, Utilities and Energy Conservation Management*
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing*
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985

FD-302 (REV. 3-10-82)

**FEDERAL BUREAU OF INVESTIGATION**

Date of Transaction 7/28/87

— 1 —

JAMES S. STONE of 6735 West 84th Circle, #69, Arvada, Colorado 80003, phone 420-3332, was contacted. STONE is employed as a Consulting Professional Engineer. STONE met with SA WILLIAM F. SMITH of the ENVIRONMENTAL PROTECTION AGENCY (EPA)/ NATIONAL ENFORCEMENT INVESTIGATIONS CENTER (NEIC) and this Agent. STONE advised that he has some information about the ROCKY FLATS FACILITY, and provided the following:

STONE provided copies of the following to the FBI, which are attached as a portion of this report:

1. Resume of Background
2. Civil Action Number 86CV3817

STONE has worked at the ROCKY FLATS facility as a Consultant and ROCKWELL INTERNATIONAL CORPORATION (RIC) employee for several years, until he was terminated in March, 1986. While with RIC, he was the lead principal engineer, and had unlimited access at ROCKY FLATS. He said that he was terminated from RIC for discussing some discrepancies with a resident DEPARTMENT OF ENERGY (DOE) employee.

After leaving RIC, he researched the fact that DOE can only limit a corporate operator contract to two, five year contracts. RIC has been at ROCKY FLATS for twelve years now.

Contrary to public knowledge, ROCKY FLATS MISSION (Main) is to accept wastes (hazardous and nuclear) from other DOE facilities. STONE is aware that some private facilities, possibly educational type, send their wastes to ROCKY FLATS. The wastes are brought in by truck and railcar, almost on a daily basis.

STONE advised that DOE employs several agency representatives at ROCKY FLATS, possibly four or five. He said that there was no way that DOE maintains one representative for every 30 RIC employees. RIC employees are forbidden from discussing any controversies in front of a DOE employee. Usually, the DOE representatives mind their own business and remain

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Investigation on 6/25/87 at Denver, Colorado File # DN 249-43-64

by SA Jon S. Lipsky/mvk Date dictated 6/28/87

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secluded from the RIC employees.

STONE advised that the description of the incinerators at ROCKY FLATS are generally correct as cited in the Comprehensive Environmental Assessment and Response Program (CEARP) of April, 1986. STONE noted that RIC incinerates more than old gloves, paper and wood.

RIC has been using an incinerator in buildings 771 and 371, that burn volitized material. In 1980, two "fluid bed" incinerators were designed and placed in Building 776.

The fluid bed incinerators are the devices to be used for the proposed test burns of hazardous and nuclear wastes. The incinerator is designed to mix chemicals on a bed of sand, with heat as a catalyst, create a chemical reaction to render hazardous chemicals to salt, water and carbon dioxide. The process of heating is not designed to reduce the volume of the waste. STONE said that he helped to design the fluid bed incinerators.

In 1981, the fluid bed incinerators were laboratory tested, and failed. The pilot incinerator has remained on line, and used to incinerate wastes on a daily basis, since 1981. STONE personally knows that plutonium wastes have been incinerated, capsulized in glass, and sent out for burial. DOE possibly has used some old salt mines in Idaho, for the burial of the nuclear waste.

STONE noted that RIC does not segregate the domestic waste from hazardous/nuclear wastes, and has continually burned all the wastes on a daily basis. DAVE GUFFY, who works the incinerator in building 771, who is possibly willing to confirm this. Also, the Chief of Construction, RON (Last Name Unknown) (LNU), may also have further information.

RIC currently distills and fractionates various oils and solvents, but the wastes are geared for incineration. Building 771 was dedicated to burning gloves. Building 374, where the fractionating is done, is routed by above-ground pipes to tanks on the northside of Building 774.

STONE said that he believes that the ground water is contaminated from previous years of waste burial, and

land application. He designed a tertiary sewer treatment system at



the facility; however, the hazardous wastes are not treated with the same care. The hazardous waste lagoons tend to overflow during and after a good rain, and the wastes are discharged without being treated.

STONE advised that RIC has numerous PCB contaminated transformers. Before 1980, it was common practice to spray the facility roads with PCBs.

In the machine shops, STONE discovered that Berilium particulates have become air-borne, and is a potential hazard to RIC employees.

STONE advised that various portions of ROCKY FLATS are considered "hot." Due to the recent burial of hazardous/nuclear wastes, RIC will not allow any construction in and around the "hot" areas. He said that RIC will sometimes pour asphalt over the "hot areas," made to appear like a parking lot, but no one uses. South of Building 774 (tank room), STONE had intended to construct a new building, but was told that the area was "hot."

STONE said that Plutonium is used in Buildings 776 and 707, and research is conducted in Building 559 RIC, as part of the DOE contract, receives a monetary bonus for continuous safety hours. STONE advised that HENRY URANO, a RIC employee, once fell from a building and refused to report a severe injury. STONE believes that the employee are under pressure to not report injuries because RIC would lose the DOE bonus.

STONE advised that he has maintained copies of various internal RIC documents and is willing to share them with the FBI.

# FEDERAL BUREAU OF INVESTIGATION

Date of Transaction 2/17/88



JAMES S. STONE of 6735 West 84th Circle, number 69, Arvada, Colorado, 80003, telephone 420-3332 was contacted at 1200 Byron G. Rogers Federal Building. STONE agreed to an interview and was present with his attorney, HARTLEY DAVID ALLEN. Also present during the interview was Assistant United States Attorney (AUSA) KENNETH R. FIMBERG and Special Agent WILLIAM F. SMITH, of the ENVIRONMENTAL PROTECTION AGENCY (EPA)/NATIONAL ENFORCEMENT INVESTIGATIONS CENTER (NEIC). After a brief introduction and stated purpose of the interview, STONE provided the following information:

The interview began at approximately 10:15 AM, a lunch break was exercised between 12:30 PM through 1:50 PM. and concluded at about 3:25 PM. STONE provided a copy of the April 6, 1987 letter from S. R. FOLEY to Senator WILLIAM L. ARMSTRONG to the FEDERAL BUREAU OF INVESTIGATION (FBI), and the letter has been incorporated as a portion of this report.

STONE was employed by the ROCKWELL INTERNATIONAL CORPORATION (RIC) as the Chief Mechanical Engineer for the ROCKY FLATS NUCLEAR PLANT (RFNP) until about March, 1986. He had overall access to the RFNP along with the Structural and Electrical Engineers for RIC. His duties included the resolution of engineering problems. During his tenure at the RFNP, STONE was supervised by TONY EDEN, Manager of Utility Design; SAM CERISE, Manager of Design, and GARY COLES; BILL NICKEL, Manager of Engineering;

DOUG CROSSLAND, Director of Facility Services; and J. DORE, General Manager. STONE supervised twelve to fifteen employees, with principal engineer and draftsmen duties.

The General Manager supervised four Division Directors, categorized as Production, Security, Operations and Services. STONE believes he was ultimately supervised under the Services Director, as was the RFNP environmental officer. The Health Safety Environmental (HSE) Manager is

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Investigation on 2/17/88 at Denver, Colorado File # DN 249-43

by SA JON S. LIPSKY/pjr Date dictated 2/18/88

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and was GARY POTTER. POTTER also holds a position with the JEFFERSON COUNTY HEALTH DEPARTMENT.

STONE recalled working with A Blue Ribbon Committee, KEN SHRUNK and DENNIS MURPHY on a particulate problem in building 444. As a result of a death,

STONE was asked to engineer a solution to the Berylium machining operation. STONE said Beryluim is extremely toxic and investigated the machining operation to control the dust problem. STONE determined through his investigation of December, 1984 through March, 1985 that the machinists were forming Berylium without a cutting oil. The larger metal pieces were being swept up, but the particulates were collecting on the walls and in the ceiling.

RIC employed an electronic monitoring system to detect the presence of Berylium dust, but the monitors did not indicate the presence of the metal dust. STONE perceived a problem, as the dust was accumulating on the walls and in the ceiling like snow drifts. DENNIS MURPHY exposed several photos of the dust in the ceiling. STONE said he believes that the monitors failed to indicate the presence of the dust because of inherent problems with the monitors. The monitors used a plastic disk to receive the dust, but the air flow from the suction may have caused an electro-static field. As a result, the dust would be repelled from the monitor and sought a more conducive resting place.

STONE said be recommended to his supervisor, that the Berylium machine shop should cut the metal in submerged oil, which would control the particulate problem. One of the machinists has been diagnosed as having Alzheimer's disease, but STONE said the employee is not suffering any memory loss and probably has Beryliosis. STONE was admonished by his supervisor to not discuss his finding with any Department of Energy (DOE) officials.

STONE identified the locations for each RIC incinerator; building 771, where the old incinerator has been since 1970's, building 779, where the pilot and full scale fluid bed incinerators have been since about 1981, and building 371, where a new incinerator is located.

DAVE GUFFY, a retired RIC employee, who was the chief operator for 771, may have further information about the incinerator operating times and the type of material that was burned. STONE said he was under the impression that the 771 incinerator was used to salvage various materials; reduce the volume of waste; and incinerate trash.

Building 779 is a research lab where RIC has constructed two fluid bed incinerators to treat mixed nuclear and hazardous wastes. The pilot incinerator has an approximate feed rate of 50 pounds per hour and the full scale model is three times larger. STONE believes that the 779 incinerator was continuously operated from 1981 until about 1986, up until the time he was employed at the RFNP.

STONE reviewed his statement of June 25, 1987 and noted two corrections: on page 2, paragraph 1, last line 776 should be 779; and on page two, paragraph 2, line 7, STONE said he did not help to design the fluid bed incinerator, but should have been asked to review the design.

STONE said he was aware that the fluid bed incinerators were tested in 1981, but he was unable to find the 99.9999 test results; the results of the test indicated less than 99.9999 efficiency and resulted in failure.

STONE said each building has a posted Quality Assurance manual for details about the operations. The records are also maintained at the plant library, Engineering Department library. Building 991 is where the nuclear waste is stored prior to incineration.

STONE reviewed three RIC photographs of an incinerator, copies of which have been attached as a portion

of this report, and believes they depict the 779 incinerator. STONE recapped the building numbers or locations of pertinent RFNP buildings:

| | |
|---|---|
| 779 | Fluid bed incinerators |
| 771 | Incinerator |
| 371 | New incinerator |
| 991 | Nuclear storage |
| 708 | Plant library |
| 124 | Manager's offices (Administrative Building) |
| 130 | HSE |
| 881 | Contaminated ducts |
| 444 | Machine shops for Berylium |
| 447 | Restructured Berylium machining |

Continuation of FD-302 of JAMES S. STONE. On 2/17/88.
Page 4

Building closest to the west side gate, Engineering Department library.

STONE said that the older plutonuim trigger housings are re-fashioned in building 447, and the process produces a slag.

STONE stated, in about 1981, be learned to not discuss RIC problems with DOE personnel. After hearing about some recommendations on the RFNP cooling towers, for replacement, BILL NICKEL told him not to discuss the situation/problems with DOE. STONE said he developed a friendship with RON FOSTER, DOE Chief of Construction, who may be cooperative.

STONE recalled that the RFNP accepted wastes for treatment, from private entities. Payment for receiving the wastes would be detailed under the RIC, Cash Accounts. STONE also said RFNP has numerous waste sites, from previous burial practices.

DN 249-43
JSL/tmp



The following investigation was conducted by Special Agent JON S. LIPSKY at Denver, Colorado, on February 29, 1988.

JAMES S. STONE of 6735 West 84th Circle, #69, Arvada, Colorado 80003, telephone 420-3332, sent the attached letter of February 26, 1988, to the FEDERAL BUREAU OF INVESTIGATION.

JAMES S. STONE

*Consulting Engineer*

6735 W. 84th Circle #69
Arvada, CO 80003
(303) 420-3332

February 26, 1988

Jon Lipsky, F.B.I.
P.O. Box 1229
Denver, CO 80201

Re: Projects on incineration of radioactive wastes at Flats:

Daily record of time:

| Auth. No. | Date | Project Title |
|---|---|---|
| 300607 | FY80 | Pyrochem. Inline instrumentation, B779 |
| 310378 | 3/81 | Hydraulic Process control, B779A |
| 900406 | 8-10/81 | Pyrochem. Development Facility (Ken Mohr) |
| 900421 | 10-12/81 | High Temperature filter specifications |
| 900415<br>349190 | 11-12/81 | Nu-wastes immobilization plant |
| 398023 | 3-83 | Vacuum heat treat furnace |
| 318107 | 10-11/84 | Contaminated furnance, Rev. B |

Auth. No. Code:

XXX Sequential nos. 000-999

X Type of funding: 0 for capital equipment & expense,
5 for GPP (general plant project)

X Fiscal year issued (last digit of year)

X Type of project: 3 for capital funded
4 for expense funded
5 for maintenance work order
9 for design criteria only

Construction Management Review, 2-21-86:

FY 87 Line Item Projects:

379685 (389685); Pu Rec. Mod. Projects; Kriznar, Proj. Adm. (PA); Jenkins, Proj. Engr. (PE); $2.15 Mil. Total Est. Cost (TEC)

FY 90 Line Item Projects:

309020; Pyrochem Dev. Fac.; Bange, P.A.; Walsh, PE; Sch. 44 LR 12/12/84 by J.J.; not supported by DOE

FY 91 Line Item Projects:

319101; Pu Recovery Support Fac.; Wiggins, P.A., Wiggins, PE; Sch. 44 LR 12/12/84; design status – hold; $3.0 Mil. TEC

FY 87 General Plant Projects:

375620; Install Plenum in Pu Rec. Fac., 771; $0.3 Mil. TEC; Des. By LATA

FY 84 Capital Equip. Projects:

340328; Real Time Analysis of Pyrochemical Process; 779A; User - RD; Current status (9-30-85) FPCO 3-18-85

FY 85 Capital Equip. Projects:

350567; Calcining & Burning GB; 779A.; User - RD; Current status (9-30-85) Part IV

FY 85, Expense Projects - Pu Operations:

440812; Precip./Calcin. Process; 371, Status 9-30-85 – Installation

440848; Incinerator Stripout; Status, 9-30-85, Construction

FY 85 Expense Projects - Research &Development:

410103; Install Glove Box for Pyrochemistry, 779; Status, 9-30085, Hold.

450103; Heat Detection, Glove Box 985, B779; Status, 9-30-85, As-builts.

FY 85 Line Items:

358204; Incinerator Plenum; $1.1 Mil. TEC; Sch.: TI 6/86, TII 12/86, Constr. Str. 4/87, Constr. cpl. 12/87; 0% Cpl. 2/86

FY 82 Line Items:

338615; Precipitation/Calcination, 771; $6.29 Mil. TEC; 44% cpl. 2/86

FEDERAL BUREAU OF INVESTIGATION



Date of transcription 3/4/88

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone (303) 420-3332, telephonically contacted this Agent and advised the following

STONE said TERRY FOPPE, ROCKWELL INTERNATIONAL CORPORATION (RIC), telephone 966-7436, is the person who administers the Quality Assurance Manuals. He also corrected his previous statements that the fluid fed incinerators were in building 779; in fact, they are in building 776.

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Investigation on 3/1/88 at Denver, Colorado

File # DN 249-43-128

by SA JON S. LIPSKY/mms Date dictated 3/1/88

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency. It and its contents are not to be distributed outside your agency.

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DN 249-43
JSL/pjr



The following investigation was conducted by Special Agent (SA) JON S. LIPSKY at Denver, Colorado, on March 9, 1988.

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone number 420-3332, mailed the attached copy of the June, 1985, telephone directory for ROCKY FLATS PLANT (RFNP).

STONE also advised that RANDY MAC DONALD of DOMINION SERVICES, INCORPORATED, Denver, Colorado, a RFNP utilities employee may have further information about Buildings 771 and 776.

DN 249-43
JSL/llt



The following investigation was conducted by Special Agent (SA) JON S. LIPSKY at Denver, Colorado, on March 9, 1988.

JAMES S. STONE OF 6735 West 84th Circle, Number 69, Arvada, Colorado, telephone number 420-3332, mailed the attached copy of the June, 1985, telephone directory for ROCKY FLATS PLANT. STONE also noted the following:

"The fluid bed incinerators are located in Building 776 instead of Building 779 as I said earlier. If you requested the process operation route sheets (PORS) on these incinerators from 1980 to date, you may have the data that you need. PORS's outline the parameters of specific operations to designate the tooling required and to identify the specifications and reference documents that apply to these operations. They would also include the manifests of material to be incinerated and safety precautions required. Also enclosed is a better map for your file. Please return directory only Jim"

A copy of the map was made; the directory and map was returned.

DN 249-43
JSL/kt



The following investigation was conducted by SA JON S. LIPSKY at Denver, Colorado, on March 25, 1988.

JAMES STONE, telephone 420-3332, voluntarily provided over 1100 copies of documents he has retained while employed by ROCKWELL INTERNATIONAL at the ROCKY FLATS plant to the FBI. The documents consisted of Utilities Department transactions and personal litigation papers. The documents were copied on the March 26, 1988 weekend, and returned to STONE on March 28, 1988.

DN 249-43
JSL/lra



The following investigation was conducted by SA JON S. LIPSRY on January 11, 1989 at Denver, Colorado:

JAMES S. STONE of 6735 West 84th Circle, Number 69, Arvada, Colorado, 80003, mailed the attached three page memo. The memo, dated January 28, 1988 regarding the ROCKY FLATS Albuquerque Operation Maintenance/Construction meeting of January 14, 1988, was made available to STONE through a pre-civil trial discovery request.

THE DISTRICT COURT

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 86643817 R-5

| | | |
|---|---|---|
| JAMES S. STONE, | ) | |
| | ) | |
| PLAINTIFF, | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| ROCKWELL INTERNATIONAL CORPORATION, | ) | COMPLAINT FOR LIBEL AND BREACH OF CONTRACT |
| | ) | |
| GARY W. COLES | ) | |
| | ) | |
| ANTHONY EDEN, | ) | |
| | ) | |
| DOE I, | ) | |
| | ) | |
| DOE II, | ) | |
| | ) | |
| DOE III, | ) | |
| | ) | |
| DEFENDANTS | ) | |

COMES NOW the plaintiff, above named, for a complaint against the defendants and states, alleges and avers as follows:

## FIRST CLAIM FOR RELIEF

1. The true names or capacities, whether individual, corporate, associate, or otherwise, and defendantship of defendants DOES I through III, inclusive, are unknown at the time of the filing of this complaint to plaintiff, who therefore sues said defendants by such fictitious names and will ask leave of court to amend this complaint to show their true names or capacities and defendantship when the same have been ascertained.

* * *

21. Defendant denied the plaintiff equal application of the law by imposing singular restrictions on the plaintiff that were not generally imposed on others.

22. Plaintiff is entitled to judicial relief from the actions of the defendant for libel, sleepless nights and mental anguish because said actions were deflamatory and unjust.

WHEREFORE, plaintiff prays for judgement against defendant, and each of them, as follows:

1. Defamation of character and mental anguish in the sum of Five Million Dollars.

2. For sums incurred and to be incurred for medical treatment in conformity to proof.

3. Loss of income incurred and to be incurred inconformity to proof.

4. Cost of suits.

5. For such other and further relief as to the court seems just and proper in the premises.

## SECOND CLAIM FOR RELIEF

1. Plaintiff incorporates herein all of the allegations of the First Claim for Relief as if fully set forth herein.

2. On November 10, 1980, plaintiff signed the Employment Certification, Invention and Secrecy Agreement for defendant.

3. Plaintiff was told by defendant that a billion dollar modernization and expansion program was underway at the Rocky Flats Plant (RPP), and that an engineering

department would be developed to do most of the work in-house. The plaintiff had a right to rely on the personal and professional integrity of his former manager and defendant and did rely on them.

4. Plaintiff soon learned that good engineering was incidental to spending the budget and maintaining the schedule, but most important was the shift of design responsibility from defendant to Architect/Engineer (A/E) sub-contractors, even though RI maintained a staff of several hundred engineers. This was contrary to our agreement.

5. Plaintiff also soon learned that the defendant's policy was never to allow the U.S. Department of Energy (DOE) engineers to learn of a mistake by the defendant, so as not to jeopardize the performance rating for the cost plus incentive allowance fee. This repeatedly compromised the ethics of the plaintiff and involved him in a fraudulent practice, including but not limited to the following:

a) On November 12, 1980, plaintiff recorded an objection to removing a forty-ton air conditioning unit for use on a four-ton load in another building. It soon became obvious that the existing engineers were not competent in mechanical engineering. The defendant's project engineers were in charge, since the design department was not fully developed, and the plaintiff's engineering report was ignored.

b) On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiff's concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiff's engineering report.

c) On December 15, 1980, plaintiff recorded serious deficiencies in design criteria of the Title I submittal

for a multi-million dollar Cooling Tower Modification Project, which was ignored by the defendant. On July 16, 1981, plaintiff recorded another report, challenging the validity of the design criteria on the above project, which was also ignored by the defendant. On August 27, 1981, plaintiff made a presentation to the defendant, which was attended by a DOE engineer, wherein the design deficiencies were exposed and a proposal to reduce equipment costs by 90% was presented. Upon defendant's refusal to consider, the plaintiff asked the DOE representative to investigate. In September, 1981, plaintiff was severely admonished by defendant and directed never to address a DOE representative again. Defendant also ordered a letter of reprimand be given to plaintiff. The cooling towers were installed as originally specified at great cost; however, the alleged deficiency in cooling water capacity still exists, because the deficiency was in the distribution system which was not corrected and not in the source of supply.

d) On March 20, 1981, plaintiff recorded an objection to the design of the air-conditioning system in the Wind Site building. It was alleged to have "the countries most efficient space heating systems", and relied 100% on solar energy. The defendant ignored the plaintiff's report. The system was a dismal failure and required much money to correct. The heating system was corrected by installing a huge electrical resistance heater, that was justified as a need to test the power output of wind generators, but its real purpose was to heat the building at great operating costs. The A/E firm was still retained by the defendant for other projects.

e) On March 3, 1982, plaintiff recorded an objection to paying an A/E firm a 45% fee and then paying an additional charge to correct their own mistakes.

6. Plaintiff has presented many constructive engineering reports to the defendant, which have all been ignored, including but not limited to the following:

a) On April 7, 1983, elimination of refrigeration for drying compressed air.

b) On May 5, 1983, develop method of estimating project design man-hours for preliminary project scheduling and resource planning; method of development and evaluation of conceptual designs for alternatives; method for review of technical contract documents for A/E firms.

c) On May 13, 1983, development of an assignment-scheduling chart for improved project management.

8. On Juen 19, 1983, plaintiff recorded an objection to farming out $230,000 worth of pre-Title I engineering work with 38% for indoctrination and education of the A/E firm employees to be furnished by RFP employees. The engineering fees were getting enormous and the U.S. Department of Energy (DOE) was not getting much for the taxpayers' money. The defendant ignored the plaintiff's concern.

9. On March 20, 1984, plaintiff reported to defendant on the chaos, waste and apathy that existed in facility engineering, including but not limited to the following:

a) The "design project list" for scheduling was grossly inadequate. About 50% of the items that should be controlled were not listed. Those that were listed had incorrect data. Defendant had been working for years supposedly to develop this system; however, the format changed weekly and it was worthless.

b) Facility Engineering was not complying with the DOE design manual for "state of the art" technology and hundreds of millions of dollars were being wasted.

c) A laboratory building air-conditioning system was installed without heat or make-up and the change cost extra.

d) Air conditioning systems were being scheduled for completion in winter, while main-frame computers were being shut down due to overheat in the

summer.

10. On April 27, 1984, plaiantiff's original manager was replaced with a defendant. The new manager was a young, inexperienced civil engineer, who was to supervise the utility design department for mechanical engineering. Plaintiff asked the manager of facility engineering about the apparent enigma and he replied "I didn't have any experience either when I first started". This was a personal and unwarranted insult to the plaintiff and a violation of professional ethics by the defendant.

11. Plaintiff reported on many plant safety situations which were ignored by the defendant, including but not limited to the following:

a) On January 2, 1985, plaintiff reported on the lack of approval of the "asbestos removal" standards which the plaintiff had developed, but which had been waiting months for approval while serious hazards existed at RFP in the remodeling work.

b) On January 8, 1985, plaintiff reported on an explanation of why Beryllium dust had not been captured and monitored by the Health Safety Department (HS). HS had been monitoring for many years with no positive tests indicated; however there was Berylliosis reported and a major campaign had to be started to correct the situation.

c) On April 16, 1988; plaintiff reported on the existence of contaminated ductwork in a building that had recently been designated as "clean" and suitable for offices. The reason given for not cleaning the ducts was that it was too expensive. Plaintiff then proposed a plan to finance the clean-up by utilizing new technology filters on the same project that would save about $5 million in capital cost on this project and about $2 million/year in energy cost throughout the RFP if generally adopted. This plan was presented prior to Title I review, but disregarded by defendant.

12. On February 13, 1985, defendant issued Promotion Guidelines for "Posted Job Vacancies" which indicated that

the plaintiff must have received an "excellent" rating for thirty consecutive months to be eligible for promotion or to sign a posting for transfer to another department. Plaintiff had signed over thirty "posting" notices trying to get out of facility engineering, without success. Plaintiff had achieved an "excellent" rating for two consecutive years prior to the 1985 annual review and the sudden reduced rating to "satisfactory" for dubious and unjust reasons. This secret policy had been in effect for several years prior to this disclosure. The failure to disclose the terms for promotion of the plaintiff by the defendants is a breach of contract and fraudulent.

13. Plaintiff does not possess sufficient information to allege ultimate facts, as the only source of information is in the sole custody and control of the defendant for presumably security reasons, but plaintiff believes that many unique design concepts for improving product quality and production have been removed from consideration and potential implementation at RFP by the defendant, including but not limited to the following:

a) An alternate inert gas to reduce part deterioration.

b) Wet machining of beryllium parts.

c) Unique energy conservation concepts.

14. Defendant has subverted and breached the contract with the plaintiff for honest, competent, professional engineering work.

15. Defendant has caused the plaintiff sleepless nights and mental anguish for being exposed to unethical and fraudulent practices by the defendant.

16. Plaintiff is entitled to judicial relief from the actions of the defendants for breach of contract, defamation of character and substantial damage to the plaintiff's reputation as a consulting engineer.

WHEREFORE, plaintiff prays for judgement against defendant, and each of them, as follows:

1. Defamation of character and mental anguish in the sum of Five Million Dollars.

2. For sums incurred and to be incurred for medical treatment in conformity to proof.

3. Loss of income incurred and to be incurred in conformity to proof.

4. Cost of suits.

5. For such other and further relief as to the court seems just and proper in the premises.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

---

**PLAINTIFF'S CONFIDENTIAL DISCLOSURE STATEMENT OF MATERIAL EVIDENCE AND INFORMATION**

---

* * *

Plaintiff James S. Stone herein submits to the United States Government, pursuant 31 U.S.C. §3730(2), his written disclosure of material evidence and information. Served concurrently herewith is a copy of Mr. Stone's Complaint Under False Claims Act, which document is being filed in camera and under seal with the United States District Court for the District of Colorado. This disclosure statement is confidential.

## I. INTRODUCTION

Mr. Stone is a Professional Engineer, registered in a number of states. His experience and qualifications span more than 40 years. Mr. Stone is an established expert in the area of waste disposal. He currently holds patents in the United States and 14 foreign countries for sewage

treatment equipment and processing. Attached hereto as Exhibit "A" is a copy of Mr. Stone's resume, with attached statements of qualifications, engineering achievements and commendations.

His work on military and defense-related projects is especially impressive. During World War II, he worked on the B-19 Bomber and the Pan-Tex Ordinance Plant at Amarillo, Texas. During the 1950's his military and defense related work included design of a boiler plant for the Rocky Flats Nuclear Weapons Plant, then operated by the Atomic Energy Commission, and the design and construction of U.S. air Force Bases at Thule, Greenland, and Lowry Field, Colorado, and rocket fuel related design for Martin Marietta Corporation.

In 1961 he performed crucial engineering analysis and testing of the missile pad ground support systems for the Atlas Missile Programs. He also performed engineering services for the Titan I ans II Missile Projects and for air conditioning systems installed at the Denver Federal Center and Critical Mass Laboratory for NASA, Huntsville, Alabama, and for the Department of Energy ("DOE") at Rocky Flats, Colorado.

From November 1980 until March 1986, Mr. Stone was employed by Rockwell International Corporation in connection with its operation of the Rocky Flats Plant, Golden, Colorado. He was employed as the Lead Principle Engineer in the Utility Design Department, Facility Engineering Division. The knowledge and information obtained by Mr. Stone during this employment, and at times thereafter, has resulted in Mr. Stone being an original source of information and allegations which have given rise to a number of investigations concerning the Rocky Flats Plant by involving the Federal Bureau of Investigation ("FBI"), the Environmental Protection Agency ("EPA"), the Nuclear Regulatory Commission ("NRC"), members of Congress, and a U.S. Grand Jury. Mr. Stone's information is also an original source of issues and disclosures recently

published by the news media.

The gist of Mr. Stone's False Claims Act lawsuit, brought for the United States Government and himself, is that all of the payments received by Rockwell International Corporation in connection with its operation of the Rocky Flats Plant from at least as early as November 1980 and continuing up through the present time are based on false "claims" within the meaning of that term as used in the False Claims Act, 31 U.S.C. §3729, et seq., as amended.

The knowledge and information obtained by Mr. Stone has demonstrated, and will demonstrate, that during the times in question, and continuing, Rockwell International has knowingly committed a multitude of crimes and other violations which include environmental crimes, the needless exposure of the Rocky Flats work force to toxic substances, the creation of conditions leading to substantial hazards of "criticality incidents" that could involve releases of radiation into the environment of the Denver metropolitan area, the sue of wasteful engineering practices and purchasing policies, the suppression of reporting of accidents and injuries, the refusal to implement proved measures for removal of groundwater and airborne contamination, the improper treatment of hazardous wastes including the illegal mixing and incineration of mixed wastes, the lack of maintenance on safety devices and contamination alarm systems, and other acts including the withholding of inventions or technology from the governments.

Overlaying this web of Rockwell's wasteful and hazardous practices is Rockwell's elaborately constructed schemes of concealment and cover-ups intended to deceive not only the United States Government, but also the State Government of Colorado and its citizens into believing that Rockwell was doing a wonderful job managing the plant, safeguarding its workers, and protecting the surrounding population.

Had the United States Government known the true nature and extent of Rockwell International's violations and

conspiratorial cover-up, which cover-up in some instances involved representatives of the Department of Energy ("DOE"), the contract of Rockwell to operate the Rocky Flats Plant would have been abruptly terminated. Accordingly, no payments including costs of operating the facility, annual fees, and/or bonuses, would have been made to Rockwell International. Under the totality of the facts and circumstances as will be fully developed in this litigation, all of Rockwell's requests for such payments should be held to be false claims for which the United States Government is entitled to treble damages plus civil penalties of not less than $5000 and not more than $10,000 for each act constituting the false claims. The total amount received by Rockwell for such claims is estimated to be in the billions of dollars.

## II. DESCRIPTION OF EMPLOYMENT WITH DEFENDANT AND INFORMATION OBTAINED

Shortly after Mr. Stone was hired in 1980, he began observing things at Rocky Flats which were, to the eye of an experienced engineer with Mr. Stone's qualifications, simply wrong. For example, Mr. Stone noticed that replacement cooling towers that were being ordered for the plant without technical specifications or relationship to resolving a problem. His job was to review the design criteria, drawings and specifications, for the $300 million per year Utilities Restoration Project that started in about 1981. He determined that no rational criteria had been used and that there was no justification for ordering equipment without proper engineering or relationship to resolving a problem.

When his repeated efforts failed to produce a rational solution to the unilateral replacement of almost all of the cooling towers, Mr. Stone sought assistance from the appropriate DOE engineer, a Mr. Ron Foster. This occurred in August 1981. Shortly thereafter, Mr. Stone was

"called on the carpet" about his communication with Mr. Foster.

In about September 1981, three managers, William Nichol, Sam Cerise and Robert Jensen, met with Mr. Stone regarding the communication with DOE. In that meeting, Mr. Nichol expressly told Mr. Stone that he did not want any government agency learning anything about problems or conditions that Mr. Stone may become aware of in connection with his employment at Rocky Flats. Mr. Nichol ordered Mr. Stone, in particular, not to communicate with the DOE regarding such matters, or with any government agency at all. Further Mr. Stone was told that if he violated this gag order, he would be fired. Mr. Stone's request that this order be put in writing was refused.

Throughout his employment by Rockwell, Mr. Stone encountered firsthand numerous instances of unsafe conditions, hazardous practices, engineering and construction practices creating excessive costs, and instances of Rockwell's knowing refusal to correct existing problems. He was unique in that he had "trouble shooting" duties which required him to visit many secured areas of the Rocky Flats Plant.

Mr. Stone's duties included the assessment of problems and the design or proposal of appropriate solutions. These problems and solutions were documented by Mr. Stone in various forms including his weekly reports to his immediate supervisor, and proposals or formal reports setting forth the relevant information. Mr. Stone has maintained these records and they are herewith transmitted as identified in a following section of this document.

A number of the instances of Rockwell's violations are rather straight forward, such as the refusal to properly size cooling towers and thereby reduce the Government's cost. However, some of the matters raised are technical and it is impossible to transmit herewith all of the texts, treatises, and documents containing technical information upon which said matters are based. Where possible, such material is

incorporated by reference. However, an ongoing process of communication between plaintiff and the Government is required so that the Government's understanding the plaintiff's full disclosure can be completed.

A number of the matters involve information which is in some manner protected. The protections include the following: (1) a stipulation between Mr. Stone and Rockwell as to the confidentiality of certain information obtained in the pending State Court litigation entitled Stone v. Rockwell International, et al., Case No. 86-CV-3817, Division 5, District Court, County of Jefferson, State of Colorado (the "Stone State Court Action"); (2) designations of certain documents and information produced in the Stone State Court Action as being Unclassified Nuclear Information ("U.C.N.I.") within Section 148 of the Atomic Energy Act of 1954 (42 U.S.C. §2168); (3) a protective order, entered February 3, 1989, in the Stone State Court Action restricting dissemination of information obtained by Mr. Stone through orders compelling discovery; (4) the fact that certain information is classified and relates to national security; and (5) a confidentiality agreement in another federal case involving Rockwell International.

In accordance with these protections a number of documents submitted herewith are submitted under seal because the documents are subject to the aforementioned stipulation, U.C.N.I. classification, or state court protective order. Presently there is pending in the Stone State Court Action a petition by McGraw-Hill, Inc., dba KMGH-TV, Channel 7, which seeks to have the protective order rescinded. In the interim, the handling of the sealed records transmitted herewith is to be determined by the representatives of the United States Government into whose possession said sealed records are transmitted pursuant to the requirements of the False Claims Act.

Information which Mr. Stone understands to be classified is not transmitted as a part of this statement. However Mr. Stone is willing to meet with the appropriate

Government representatives to discuss such matters as may be necessary for the Government's purposes in responding to this action.

Subject to limitations discussed above, the following is a list of hazardous conditions, unsafe practices, and improper engineering or construction techniques about which Mr. Stone has acquired personal knowledge and information.

1: Beryllium contamination and the refusal to implement solutions. In 1984, DOE issued a report documenting beryllium contamination of a Rocky Flats worker due to excessive exposure to airborne beryllium. (See Exhibit "H" in Box I). Rockwell responded by appointing a blue-ribbon committee, including Mr. Stone as the lead engineer, with a priority assignment to identify and resolve any beryllium contamination problems associated with beryllium operations, in particular in the beryllium shops of Building 444. Mr. Stone, through his own research and investigation efforts, discovered startling facts including: (a) in 1975, Rockwell failed to implement a known set of testing procedures for determining personal contamination in beryllium workers; (b) that the air filter monitoring devices installed at Rocky Flats to detect airborne beryllium had, for many years, given significant-ly and consistently low readings of airborne beryllium due to an electrostatic repulsion effect; (c) that the exhaust ventilation system used in Building 444 to control beryllium dust was defec- tive and incapable of reducing levels below legally required minimum; (d) that other industries in which beryllium was machined had adopted the "wet" method of machining beryllium in order to effectively control the airborne beryllium hazard; (e) and that substantial deposits of dust and particulate matter, most probably containing a significant amount of beryllium, had accumulated in the ventilation duct work of Building 444.

Mr. Stone proposed to the committee a modified form of "wet" machining be used at Rocky Flats coupled with a beryllium chip recovery process which Mr. Stone designed.

Such system, as designed, would not only control the dust hazard at the source, but also increase the recovery of government property in the form of recyclable beryllium wastes, and allow for better machining of the part. The committee favored the idea and a research and development team was appointed, including Mr. Stone, to conduct testing to determine the feasibility of using the "wet" machining for the beryllium components which are ultimately included in the nuclear warhead triggers manufactured at Rocky Flats. A "wet" machining apparatus was built and sophisticated testing determined that the parts were as good or better as the parts normally machined without the "wet" process.

Despite the advantages of "wet" machining, Rockwell rejected the proposal, along with Mr. Stone's proposed solutions, in favor of a revamping of the exhaust ventilation system in place. According to testimony obtained in the Stone State Court Action, the decision to go with the revamped system was based on verbal reports of the claimed success, as supported by inadequated documentation and measurements, of a similar system at the British counterpart to Rocky Flats in England. (Rockwell has refused to produce the British documentation on the basis that it is the property of the British Government and the British Government does not consent to its production. But Mr. Stone has reviewed the documentation.)

Also, in the Stone State Court Action, significant documentation, including photographs, has been obtained as to the above matters. However, with some exceptions, this information is presently under the above referenced protective order.

Detailed information has been obtained as to the extent of beryllium related diseases among certain Rocky Flats workers, which information and records are under a confidentiality stipulation. These records, as other protected records, are transmitted herewith under seal for the Government's handling in accordance with the applicable law governing said protections. Unfortunately

copies of some of the records, in particular some drawings and photographs, have not yet been produced by Rockwell in the Stone State Court Action, despite a court order to do so.

2. Air Duct Contamination, Building 881. In connection with Mr. Stone's work on remodeling of a portion of the air handling systems for Building 881, he proposed methods for the decontamination and/or removal of exhaust duct work which, after having been in place for many years in Building 881, had become highly contaminated with many radioactive and toxic substances. At the time, the hazardous uses of Building 881 had been cut back to a single small laboratory so that other portions of the building could be remodeled for use by unprotected office workers. Mr. Stone saw no purpose in leaving in place the large system of contaminated duct work when a separate system could be installed and dedicated to the single small laboratory handling hazardous substances. Mr. Stone objected to leaving in place the contaminated duct work, which most probably contained significant particulate deposits of hazardous wastes including concentration of plutonium and other radioactive materials, because an accidental rupture, discharge, or other incident allowing the contamination to exit the duct work into the interior of the building could cause injury to the unprotected office workers. Despite the knowledge that Mr. Stone was correct, his proposals were not implemented.

3. Criticality hazards. Mr. Stone is the source of information for recently initiated investigations into the potential and/or past occurrence of criticality incidents at Rocky Flats plants involving uncontrolled or excessive nuclear chain reactions caused by mishandling or inadvertent concentrations and configurations of such nuclear material as plutonium. One of these investigations is being conducted by the news media, in particular Denver TV Station KMGH, Channel 7, which, as a result of information from Mr. Stone, submitted a Freedom of Information Act Request to DOE. A portion of the results

of that request were released on a June 19, 1989 special broadcast entitled "Critical Mass" which contained interviews and discussion with Governor Roy Romer, James Stone, and Congresswoman Pat Schroeder, and University of Colorado Professor Niel Schoenbeck.

It was known that there have been numerous criticality alarms, and numerous failures of criticality alarms over the past ten years at Rocky Flats. In connection with the Stone State Court Action, documentation has been obtained by Mr. Stone which indicates in 1987, levels of contamination in Building 881 that could cause criticality. One of those documents is not protected in that it was filed as an exhibit with the state court prior to the entry of the protective order. Attached hereto has Exhibit "B" is a true copy of that document which is a Title II Review, dated March 27, 1987, regarding the Renovation of Building 881, with attached "post-it" notes (document numbers 8266 and 8267). One of the attached "post-it" notes indicates that Room 127 "looks like" the only room "that will contain levels that could cause criticality". Notes on the "Comments" portion of the document indicate that Criticality Engineering must be consulted and that "All personnel working in areas of this renovation where [plutonium] may be encountered must complete appropriate nuclear criticality safety training prior to starting the job."

This information and Mr. Stone's efforts have also resulted in a request by the offices of Senator Tim Wirth and/or Congressman David Skaggs that the Nuclear Regulatory Commission investigate criticality incidents and the potential for criticality incidents at Rocky Flats. Mr. Stone is in the process of gathering documentation relating to this request for investigation, as well as those documents obtained from the Department of Energy pursuant to Mr. Stone's information. Copies will be provided to the Government as soon as possible.

4. Improper, outdated, and excessively costly airfiltration systems at Rocky Flats. As a result of his work

on the air exhaust system at Building 881, and other areas, Mr. Stone discovered that the technique used for filtering air exhausts throughout Rocky Flats, i.e., remote multiple HEPA filters, was, through outdated design and improper maintenance and servicing, creating a hazard and/or potential hazard that ruptured filters containing excessive particulate contamination could spew radioactive material into the atmosphere. Mr. Stone also discovered that a superior HEPA mini-pleat filter, when installed in connection with a pre-filter designed to remove the larger particulates from the air stream, would both filter the air more effectively and reduce the plant wide cost of air filtration by millions of dollars per year.

Mr. Stone engaged in repeated and protracted efforts to have the superior filtration system implemented. He verified state of the art technology with other agencies and manufacturers. He conducted independent research and testing. However, all of Mr. Stone's efforts were defeated by improper means or objections to the new filters which were not based on sound engineering analysis. For example, the new filter was rejected after Rockwell conducted hot air tests on the wrong model of the filter. Had the correct model been used, the filters would have passed the test.

5. Leaking glove boxes with inoperable safety valves. Mr. Stone learned that glove boxes, in particular those in Building 771, had unacceptably large leaks and gaps in their construction, such being revealed by a simple light test. Mr. Stone further observed that safety valves connected to the glove boxes, so-called "dump valves", were either capped off so as not to be connected to the safety vacuum system or were inoperable when tested. These valves, at an approximate cost of $6,000 apiece from the supplier, were not, despite these facts, subjected to scrutiny or replacement by Rockwell.

6. Material balance. This engineering technique which, in the case of physical materials, involves an accounting

system which shows missing or lost material when the amount of material going into a given process or location is balanced against the amount of material leaving that process or operation. Mr. Stone applied this technique to various critical materials, in some cases those critical to the national defense, which application reveals significantly large amounts of said material, being government property, not to be accounted for. This technique and its implications was relayed by Mr. Stone to the Federal Bureau of Investigation ("FBI") which developed and applied said concept in its recent search warrant application, dated June 6, 1989, filed with the U.S. District Court, District of Colorado, for example at pages 34 through 38 of the application signed by a Jon Lipsky, in order to show probable cause that violations of the Resource Conservation and Recovery Act ("RCRA") had occurred. The same technique has been applied by Mr. Stone in his analysis of other materials, the details of which cannot be set forth in this statement as it would involve classified information.

7. Classified. Mr. Stone has knowledge and information that Rockwell has failed to apply new technology, developed under contract with DOE, which if applied would increase the quality of the final products, being Government property, delivered to the Government in connection with its Rocky Flats operations. Said information is classified and bears upon matters of national security. Accordingly Mr. Stone cannot set forth said information in this document.

8. Groundwater contamination. Mr. Stone prepared and proposed an intercepter trench system which, if installed in the appropriate geologic and geographic location at Rocky Flats, could be used to remediate the groundwater contamination hazard that exists as a result of the operations of Rocky Flats. This proposal was not implemented. Mr. Stone has information that Rockwell and the DOE worked together to prevent discovery of groundwater contamination problems at Rocky flats.

Attached hereto as Exhibit "C" is a true copy fo a July 14, 1986 DOE memorandum to the Assistant Secretary for Defense, and others, along with a copy of a DOE briefing for meetings with Admiral Foley, and others. Said documents which were provided by Mr. Stone to the FBI reveal efforts to frustrate state and federal environmental regulation and enforcement, including suits by private individuals. Portions of these documents, for example Section II.C. of the Briefing (document 3287), indicate a knowledge that Rocky Flats was not in compliance with said laws, including RCRA. This document is quoted in the application of Agent Jon Lipsky, at paragraph 5.29, page 43. Among the uoted language is an admission that there were virtually no RCRA groundwater monitoring wells at Rocky Flats.

9. Modules J and K excursions, Building 707. An "excursion" is an outflow of contaminated material from its intended containment to a non-contaminated area. Mr. Stone was aware of excursions in these modules. An inexperienced engineer was allowed to prepare a design to remedy the problem. The design should have been routed to Mr. Stone for his review. But, due to an effort to circumvent Mr. Stone and his practice of pointing out real problems, this review was avoided. By happenstance, the design came to Mr. Stone's attention and he observed a fundamental error which called for air duct configuration that would have increased the chance of further excursions. The design violated fundamental Rocky Flats/DOE design criteria. This is one of numerous instances of such violations noted by Mr. Stone.

10. Asbestos removal standards. Mr. Stone was requested to prepare written standards for the removal of asbestos. Despite his promptness and the correctness of these standards, their approval was substantially delayed for improper reasons.

11. Wind site heating system. Mr. Stone discovered excessive economic waste in this project involving a building purportedly designed by an outside engineer to be a 100%

solar heated building which would not require any backup heating. An electric heater was installed purportedly to test the electrical power generated by the wind generator, but for the real purpose of heating the building which was a costly failure.

12. Illegal incineration of wastes at Building 771. One of the primary aspects of the recently initiated FBI investigation of Rocky Flats is the allegation of illegal mixing and burning of wastes in Building 771 using outdated equipment for which there is no permit. Mr. Stone had firsthand knowledge of this practice and relayed that knowledge, as well as the identity of individuals willing to relay similar knowledge, to the FBI. Further, Mr. Stone informed the FBI as to methods for effective detection of illegal incineration which information was utilized by the FBI in its investigation.

13. Energy conservation. Mr. Stone prepared and presented a number of energy saving proposals which, if implemented, could have reduced the cost of power used at Rocky Flats by up to 50% or $3,000,000 per year. One of these proposals was "peak load shaving" which calls for the plant to use its emergency power generators during periods of peak power usage. Tremendous savings in the cost of power purchase would have been created since the rate paid for power is based on the amount of power drawn from the public utility during peak periods. These proposals were rejected despite their validity.

14. Analysis of pond crete method for drainage of solar evaporation ponds. Solar evaporation ponds have, for some time, been used to treat RCRA hazardous wastes. Mr. Stone reviewed a design for the process and mechanical system intended to be used for removing sludge from these ponds. The system was proposed by a Mr. Leon Fong. Based on Mr. Stone's years of experience in the handling of sewage and sludge, he immediately recognized that the design could not work and would lead to serious problems. For example, the system was designed to remove sludge

from the pond and mix that sludge with cement in order to create blocks of "pond crete" for disposal use. Mr. Stone foresaw that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the "pond crete" blocks would rapidly disintegrate thus creating additional contamination problems.

Mr. Stone's advice, which involved alternatives, was rejected and the system was built as improperly designed. As shown by the FBI's search warrant application, at page 89, this system failed on at least one occasion during 1988 when Pond 207A was being drained for mixing, in Building 778, to form "pond crete" blocks. Mr. Stone's information also led to the FBI's broader investigation of Solar Evaporation Ponds and their misuse by Rockwell.

15. PVC piping failure, water treatment plant. In one incident, a high pressure PVC piping exploded sending shards of PVC across a room with sufficient velocity to kill or injure a person Contrary to Mr. Stone's advice to his supervisor, Anthony Eden, the piping was re-installed in the same configuration as before, despite Mr. Stone's objection that shock absorbers must be installed to prevent re-occurrence.

16. Inadequate designs. Mr. Stone continually found himself reviewing designs for various projects which designs were obviously inadequate or excessively expensive. For example, he reviewed a design for a locker room addition prepared by a young engineer named Kitt Dorr, the son of the Plant's General Manager. The building was a slab-on-grade, block wall, construction which should have cost approximately $50 per square foot to construct. However, Kitt Dorr's design and estimate called for a cost of $175 per square foot.

17. Cooling water distribution problem. Mr. Stone analyzed a reported problem involving a shortage of cooling water at some stations. He observed that the piping system for delivery of cooling water was improperly designed.

Others proposed the solution of purchasing larger cooling towers. Mr. Stone's analysis was rejected and the larger towers were purchased. The larger towers did not solve the problem and Mr. Stone again analyzed the problem. However, the piping solution could not be implemented because the allowed budget had been exhausted by the purchase of the new towers.

18. Non-nuclear production building 460, equipment overexpansion joints. Mr. Stone discovered that critical machines, such as huge automatic lathes, had been installed, per the design of an outside designer, overexpansion joints. This clearing error causes these machines, which must be installed to very fine tolerances, to be subjected to continual variation and movement when the building moves at its expansion joints. This was reported to Mr. Eden, Stone's supervisor. Mr. Stone also discovered an erroneous design for cooling of the machining processes which should have been accomplished by direct liquid cooling at the point of machining, instead of air conditioning of the entire high bay manufacturing building volume.

19. Production support building 130, value engineering error with motors. Mr. Stone's critique fo an excessively costly HVAC system was rejected on the basis of a manufacturer's computer calculations which were known to be biased by improper input data as to the efficiency of the motors to be used. A proper value engineering analysis using a technique known as "life cycle cost analysis" would have shown Mr. Stone's alternative design to be far less costly. Mr. Stone's analysis was rejected even though it was known to be correct. Such a scenario occurred repeatedly with Mr. Stone's value engineering critiques, despite orders calling for value engineering to be used.

20. Logistics support building 850, fire protection system improperly designed. Mr. Stone determined and reported a failure to design this system in accordance with Rocky Flats standards. The computer generated hydraulic test of water piping design for the system indicated velocities of up to 30 feet per second which, in real

operation, would create pressure surges and knocking sufficient to pull piping elbows and cause system failures.

21. Building 771 exhaust plenum. An inexperienced engineer was allowed to violate a Rocky Flats standard which requires two exits in an exhaust plenum. Even though the Fire Department also caught the error, the engineer did not want to correct the safety violation. Mr. Stone insisted on the change, but was later charged for failing to be a "team player" and support to the engineering department by agreeing with the operating engineers who also wanted two exits from all filter plenums.

22. Security/traffic violations. Mr. Stone has information regarding such violations including the shipment of wastes to other states without notice, and the shipments of purportedly "empty" drums which did in fact contain material.

23. Safety Working Manhours. Mr. Stone has knowledge that serious injuries to employees at Rocky Flats were not accounted for in claims by Rockwell to have conducted operations for millions of manhours without injury. These claims were a factor in Rockwell's inducing the Government to pay bonuses.

24. Rockwell's personnel system. Information obtained by Mr. Stone indicates that Rockwell's personnel, or human resource, management system is flawed and defective such that individuals are promoted above their qualifications to positions having titles and levels of responsibility which said individuals could not obtain in the normal private sector for employment outside Rocky Flats. Consequently Rockwell has created a cadre or selected group of managers who are not qualified for the critical and sensitive positions they hold. Their knowledge that they could not obtain similar employment outside Rocky Flats tends to create abnormal levels of loyalty to Rockwell despite knowledge of illegal activities and unsafe practices.

25. Plutonium recovery building 371. Mr. Stone, as a result of visiting this building on many troubleshooting assignments, observed that a great deal of money was being wasted and that the operating efficiency of this vital facility

was very low. His supervisor, Mr. Eden, was manager of this building. Despite being informed of Mr. Stone's observations and suggested solutions, Mr. Eden did nothing.

26. New incinerators for radioactive waste. Mr. Stone has suggested several alternatives to the now controversial selection of the fluid bid incinerators in building 776. A proper value engineering analysis should have been conducted considering these alternatives.

Documents and information pertaining to the above matters are, to the extent presently and legally possible, transmitted herewith and identified in the following section.

## III. DOCUMENTS AND INFORMATION TRANSMITTED

Transmitted herewith, with indication as to whether or not said documents are sealed, are the following:

BOX I.

1. Essential documents and data base collected in connection with Mr. Stone's employment, numbered 1 through 1085, 1200 through 1258, 1359 through 1799, 1800 through 2222, 2223 through 2663, and 2664 through 2941 (which documents are discussed, identified and correlated at great length in the pleadings of the Stone State Court Action).

BOX II.

1. List of the following pleadings and discovery items from the Stone State Court Action:

(a) Complaint;
(b) Proposed Amended Complaint;
(c) Second Answer to Amended Complaint;
(d) Plaintiff's First Set of Interrogatories, etc., and Responses thereto;
(e) Plaintiff's Combined Requests for Admission, Second Set of Interrogatories etc., and Responses

Thereto;

(f) Plaintiff's Third Set of Interrogatories and Responses Thereto (responses are sealed as they contain information covered by confidentiality Stipulation);

(g) Plaintiff's Fourth Set of Interrogatories etc., and Responses Thereto;

(h) Plaintiff's Descriptive Statement of Claims with Exhibits (contains correlations to numbered documents in Box I);

(i) Supplement and Errata to Plaintiff's Descriptive Statement of Claims;

(j) Plaintiff's Supplemental Responses to Discovery and Updated Disclosure (contain correlations to numbered documents in Box I);

(k) Affidavit of James S. Stone, dated May 19, 1988;

(l) Plaintiff's Response to Motions for Summary Judgment or Partial Summary Judgment; Affidavit of James S. Stone

(m) Exhibits to Plaintiff's Response to Motions for Summary Judgment or Partial Summary Judgment;

(n) Exhibit "H" to Plaintiff's Response to Motions for Summary Judgment, being the Department of Energy's Investigation Report of Beryllium Disease Case, issued October 1984;

(o) Motion to Supplement Plaintiff's Response to Motions for Summary Judgment, etc.;

(p) June 12, 1989 letter from defendant's counsel to Judge Barnhill, Jefferson County District Court with enclosed Motion for Leave to File Motion for Change of Venue;

(q) June 16, 1989 letter from plaintiff's counsel to Judge Barnhill;
(r) Petition of McGraw-Hill Broadcasting Company, Inc., dba KMGH-TV (Channel 7) to Rescind Protective Order, etc. (attached as exhibits are the Stipulation and Protective Order restricting dissemination of information);
(s) Plaintiff's Joiner and Brief in Support of Petition to Rescind Protective Order, etc.

2. Bound volumes including:

(a) May 16, 1988 deposition of Anthony Eden;
(b) February 19, 1988 deposition of Larry Ferris;
(c) August 28, 1987 deposition of James Stone;
(d) May 12, 1988 deposition of James Stone;
(e) September 15, 1988 deposition of James Stone;
(f) September 16, 1988 deposition of James Stone;
(g) September 19, 1988 deposition of James Stone;
(h) May 16, 1988 , 1988 deposition of John Marschall;
(i) September 19, 1988 deposition of John Briggs;
(j) September 16, 1988 deposition of William Leslie;

BOX III.

1. Additional bound volumes including

(a) December 5, 1988 deposition of William Leslie (under seal per protective order);

(b) December 9, 1988 letter transmitting technical reports of John Briggs (under seal per protective order);

(c) January 20, 1989 deposition of John Briggs (sealed as under protective order);

(d) May 11, 1988 transcript of Court hearing;

(e) May 23, 1988 transcript of Court hearing;

(f) Plaintiff's Brief in Support of Motion for Partial Summary Judgment (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(g) March 4, 1987 deposition of Michele Soule (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(h) March 4, 1987 deposition of Joyce Bolton (Gonzalez v. Rockwell, U.S. District Court, No. 86-Z-1460);

(i) Document Nos. 3451 through 3569 with attached Rockwell Standards for Wind Design Calculations;

(j) U.S. Department of Energy General Design Criteria Manual (DOE 6430.1, 12-12-83);

2. Additional unbound documents including documents Nos. 2942 through 3087 and 3279 through 3450; and

(a) Search Warrant and FBI Application for Search Warrant (121 pages), both dated June 6, 1989, for Rocky Flats Plant;

(b) Pages 1 through 294 of FBI Receipt for Property Seized (which seized property is incorporated herein by reference);

(c) Earthquake hazard map of United States;
(d) February 1988 draft of DOE Report re Building 776/777;
(e) DOE Orders 5483.1 and 5483.1A re OSHA Program;
(f) June 16, 1989 Agreement in Principle between DOE and State of Colorado;
(g) Miscellaneous documents received and prepared, Nos. 3572 through 3596.

BOX IV (Sealed)

The enclosed records, are copies of some of the approximately 300,000 pages of records produced by Rockwell International at Rocky Flats on December 13 and 14, 1988, under court order in the Stone State Court Action. By terms of the Protective Order in said action, dated February 3, 1989, said documents are sealed in that said order restricts dissemination outside the State Court Action. Presently there is pending an application to rescind the Protective Order. Please note that the documents in this box do not include photographs and drawings which Rockwell has been ordered to produce, but which they have failed to provide as Stone has requested and paid for. All 300,000 pages of documents are reportedly maintained in the offices of counsel for Rockwell, James Abrams, Esquire, in Building 111, Rocky Flats in boxes numbered approximately 1 through 65. Additionally, the documentation regarding the air evacuation system for beryllium machining in Great Britain has not been produced.

The documents transmitted in Box IV are documents numbered by plaintiffs as 5001 through 9000 (with document Nos. 8996 through 9000 having been mailed after the document production).

DOCUMENTS NOT TRANSMITTED.

Personnel and employment records produced by

Rockwell, hand numbered as document Nos. 1 through 2764, are not produced with this transmission. Said documents involve Rockwell's records of James Stone's employment, which are not subject to the Protective Order or Stipulation for confidentiality, and personnel records of other individuals, which records are subject to the Stipulation for confidentiality.

Mr. Stone will produce or allow inspection of these records to the extent allowed by the court, as well as any others he may have which have relevance, whether marginal or otherwise, to the subject of the instant statement of information.

## IV. MR. STONE IS AN ORIGINAL SOURCE OF THE INFORMATION UPON WHICH ALLEGATIONS OR TRANSACTIONS IN INVESTIGATIONS AND REPORTS IN THE NEWS MEDIA ARE BASED

Prior to the filing of this action, Mr. Stone met on a number of occasions with FBI Agent Jon Lipsky, and EPA Agent William Smith. Attached hereto as Exhibit "D" is a copy of the FBI memo of Jon Lipsky reflecting a June 25, 1987 meeting with Mr. Stone.

Throughout his meetings with the Government, Mr. Stone has provided information, key documents, and the identities of individuals who have cooperated in the investigation, at the request and recommendation of Mr. Stone.

Mr. Stone's actions have been exemplary and courageous. He is a patriot who believes the U.S. Government, and its taxpayers, are entitled to a superior national defense that is not subject to blatant contractor fraud.

Mr. Stone's information, knowledge, and allegations, form an original source of the current investigation of Rockwell International, and its operations at Rocky Flats by the Government (EPA, FBI and Grand Jury), as reflected in the FBI Search Warrant and Application therefor.

Additionally, information and knowledge obtained by Mr. Stone has led to the request for the Nuclear Regulatory Commission to investigate criticality hazards at Rocky Flats. Further, his information has prompted the Freedom of Information Request and investigation conducted by KMGH TV, Channel 7, of Denver, Colorado.

Independent of these investigations, Mr. Stone has conducted his own investigation. Through his efforts in the Stone State Court Action, he has uncovered thousands of pages of evidence, some of which is transmitted herewith, and which is not only relevant to the State Court Action, but also material to the instant action.

Mr. Stone has communicated with the Government regarding his reservation of claims under the False Claims Act. Attached herewith as Exhibit "E" is a true copy of the February 29, 1988 letter from counsel for Mr. Stone to Kenneth R. Fimberg, Assistant U.S. Attorney, confirming Mr. Stone's communication of that position during a February 17, 1988 conference with Mr. Fimberg and others.

Attached hereto as Exhibit "F" is a true copy of Mr. Fimberg's March 1, 1988 letter acknowledging Mr. Stone's position.

## V. CONCLUSION

To the extent possible, the foregoing represents a statement of substantially all evidence and material information possessed by Mr. Stone. As noted in various portions of the document, some evidence is either classified, too technical, too voluminous, or otherwise not susceptible to inclusion at this time. However, Mr. Stone is ready and willing to revise and supplement his submittal of information in accordance with the Government's needs in pursuing and evaluating this matter. All communications regarding this matter should be directed through the undersigned or representatives of his law firm.

DATED: July 5th, 1989

LEEVAN & ALLEY

By: /s/ Hartley David Alley
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* * *

HARTLEY DAVID ALLEY
ATTORNEY AT LAW

February 29, 1988

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BLAKE STREET
DESIGN DISTRICT
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80202
(302) 266-7438

HAND DELIVERED
CONFIDENTIAL

RE: JAMES S. STONE

Dear Mr. Fimberg:

This confirms my statement of Mr. James Stone's position on any claims he may have under the False Calims Act, 31 U.S.C. Sect. 3729-32, as amended in 1986, such statement made during our February 17, 1988, conference at your office. I represent Mr. Stone in connection with those claims.

As stated, Mr. Stone reserves any claims or rights he may have under the False Claims Act. He firmly believes he is the source of information that would show the contractor in question has knowlingly submitted false and fraudulent claims to the U.S. Government for payment or approval. Under the Act, Mr. Stone would be entitled to a portion of monies recovered by the government.

Although your investigation may not focus on false claims for payment, I felt it was necessary to clarify the False Claims Act position at the onset. If, for any reason, you or your office believes Stone is giving up any of those rights under the Act, please notify me at once.

Mr. Stone's continued cooperation is given in reliance on your acknowledgment of his position stated above.

Please feel free to contact me should you have any questions or comments regarding this matter.

Very Truly Yours,

/s/ Hartley David Alley

Hartley David Alley

HDA/me
cc: Mr. James S. Stone, P.E.

[seal and portions of letterhead omitted]

*U.S. Department of Justice*

*United States Attorney*
*District of Colorado*

*Byron G. Rogers Federal Building*
*Twelfth Floor, Drawer 3615*
*1961 Stout Street*
*Denver, Colorado 80294*

March 1, 1988

[Received]
[Mar 3 1988]

CONFIDENTIAL

Hartley David Alley, Esq.
1961 Wazee Street, No. 200E
Denver, Colorado 80202

Re: James S. Stone

Dear Mr. Alley:

Thank you for your letter dated February 29, 1988. As I indicated previously, our investigation of various activities at the Rocky Flats nuclear facility is ongoing and only started recently. While we sincerely appreciate Mr. Stone's assistance, it is unclear at this time whether our investigation will focus upon or result in any charges or allegations as to false contract claims or requests for payment. We therefore acknowledge your letter and Mr. Stone's position, but cannot make any further representations or agreements at this time.

Again, we appreciate your cooperation and look forward to meeting with you further.

Sincerely yours,

/s/ Ken Fimberg

KENNETH R. FIMBERG
Assistant U.S. Attorney

KRF:mjg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

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**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

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Preliminary Statement

In 1986, James S. Stone alerted the Federal Bureau of Investigation and the Environmental Protection Agency to serious environmental, health and safety problems resulting from defendant Rockwell International Corporation's

operation of the Rocky Flats nuclear weapons plant. Stone's detailed personal knowledge of the problems at Rocky Flats, and his access to documentary support, were a result of his six years' work for Rockwell as an engineering "troubleshooter" at Rocky Flats.

Over the next three years, Stone met at least three more times, and had several telephone conversations, with government investigators. He turned over thousands of pages of relevant Rockwell documents. He told the government where to look for more key documents and evidence. And he provided names of additional people who would corroborate his story.

Stone advised the federal authorities that Rockwell was contaminating the surface and ground water at Rocky Flats. He told them that Rockwell was ignoring substantial accumulations of radioactive materials, including plutonium, hidden in building exhaust air duct systems that threatened the health of Rockwell's workers. And he alerted the authorities that Rockwell was exposing its workers to dangerous levels of beryllium, an extremely toxic metal known to cause the deadly lung disease berylliosis. Given Rockwell's continued operation of Rocky Flats, Stone had every reason to believe that Rockwell had failed to disclose these serious environmental, health and safety problems in order to continue receiving tens of millions of dollars in annual compensation from the United States.

Stone was correct that Rockwell had failed to inform government authorities of its continuing environmental problems. The United States Government soon commenced a criminal investigation that resulted in the unprecedented issuance of a search warrant for a Department of Energy facility; an unannounced FBI raid of Rocky Flats; the termination of Rockwell's contract with the United States Government; the first-ever empaneling of a special grand

jury in the District of Colorado; a three-year criminal investigation; and, ultimately, Rockwell's plea to ten criminal violations (five felonies) of the environmental laws and payment of the largest federal hazardous waste fine in the history of the United States. Stone was hailed in the press and by congressional leaders as the man who had "blown the whistle" on Rockwell's crimes at Rocky Flats.

Against this backdrop, Rockwell now seeks to dismiss Stone's False Claims Act ("FCA") case on the ground that Stone allegedly was not an "original source" of the information upon which his complaint is based. Rockwell offers two arguments. First, Rockwell contends that Stone's case is a "parasitic," "copycat" suit that "plagiarized" already public allegations of Rockwell's environmental violations contained in such documents as the search warrant issued for Rocky Flats. Alternatively, Rockwell argues that even if Stone was an "original source" of the facts underlying Rockwell's environmental, health and safety problems (as indeed he was), this case still must be dismissed because Stone does not have direct and independent knowledge of the specific false statements and omissions that Stone contends Rockwell made to the government to obtain its semi-annual payments for operating Rocky Flats.

Both of Rockwell's arguments are meritless. As we demonstrate below, far from a "copycat" lawsuit, Stone's is a textbook "whistleblower" case. Stone's allegations of Rockwell's environmental, health and safety problems are based on his direct and independent knowledge gained through six years of work at Rocky Flats and disclosed to the government prior to the commencement of this lawsuit -- precisely as required by the "original source" provisions of the FCA. The fact that Stone's allegations mirror in some respects the public allegations resulting from the criminal

investigation into Rockwell's operation of Rocky Flats is not because Stone "copied" them. Rather, it is because the public allegations themselves stemmed in part from the information that Stone disclosed to the federal authorities in the first place. Rockwell's "copycat" argument is completely backward.

As for Rockwell's second argument, the FCA does not require a qui tam plaintiff to be an "original source" of the specific false statements or concealments alleged in his lawsuit, as opposed to being an "original source" of the underlying facts that make the statements or concealments false or fraudulent. Indeed, if Rockwell's view of the law were correct, the only inside "whistleblowers" who would qualify as plaintiffs under the FCA would be those that worked in a company's compliance or contract office and therefore had direct knowledge of the company's permit applications, environmental certifications or submissions to the government for payment. The entire class of employees like Stone -- who work on the "shop floor" and, as a result, are in the best possible position to know of a company's fraudulent government contract practices -- would be eliminated entirely as qualified *qui tam* plaintiffs. This overly narrow and, we submit, nonsensical, reading of the FCA contradicts its statutory language, its legislative history, its underlying public policy, and every case to touch on the issue.

As we demonstrate below, James S. Stone is precisely the type of "whistleblowing insider" that Congress had in mind when it enacted the *qui tam* provisions of the FCA. He is an "original source" of the information on which the allegations of his complaint are based. Accordingly, Rockwell's motion to dismiss should be denied, and the Court should enter an Order finding that subject matter jurisdiction exists and permitting this case to proceed to

trial.

Statement of Facts

The facts relevant to the instant motion are set forth in the Affidavit of James S. Stone, sworn to February 27, 1993, and the exhibits attached thereto ("Stone Aff."). They are summarized below.

James S. Stone ("Stone") was employed by defendant Rockwell International Corporation ("Rockwell") as an engineer at Rocky Flats from November 1980 until March 1986. (Stone Aff. ¶ 2) During his employment, Rockwell operated Rocky Flats under a contract with the United States. (Id. ¶ 28) Stone was aware during his tenure at Rocky Flats that Rockwell was required to operate Rocky Flats in accordance with federal, state and local environmental, health and safety laws. (Id. ¶ 29) Stone also learned while at Rocky Flats that Rockwell's compensation under its contract with the United States was based in part on Rockwell's satisfactory performance in various subject matter areas, including environmental protection. (Id. and Ex. L)

Stone's job at Rocky Flats was essentially to serve as a roving engineering "troubleshooter." (Stone Aff. ¶ 3) In this capacity, Stone was assigned to numerous projects throughout Rocky Flats that required him to learn about, and recommend solutions for, various environmental, health and safety issues at the plant. (Id. and Exs. A, C-K) Specifically, Stone worked on projects concerning, among other things: (a) the operations of the Rocky Flats' sewage treatment plant, and related problems with the disposal of toxic wastes (Id. ¶¶ 4-16 and Exs. A, C-E); (b) the handling of radioactive plutonium by Rocky Flats workers and the safety devices employed by Rockwell in this regard (Id. ¶¶ 17-24 and Exs. A, F-J); (c) the refurbishing of the exhaust

air duct systems in various Rocky Flats buildings (Id. ¶¶ 17-27 and Exs. A, F-K); and (d) the handling of beryllium by Rocky Flats workers and the safety devices employed by Rockwell in that regard (Id. ¶¶ 25-27 and Exs. A, K).

During the course of Stone's work outlined above, he discovered serious environmental, health and safety problems in each of these general subject matter areas. Stone analyzed and reported what he viewed as serious environmental concerns involving ground and surface water contamination stemming from the misuse of spray irrigation methods, the improper treatment, storage and disposal of industrial and radioactive wastes, and the poor operations and maintenance of the Rocky Flats sewage treatment plant. (Stone Aff. ¶¶ 4-16 and Exs. C-E) He uncovered substantial and dangerous flaws in the "gloveboxes," safety valves, filters and related safety devices purportedly employed by Rockwell to protect its workers from exposure to deadly radioactive plutonium. (Id. ¶¶ 17-24 and Exs. F-J) He alerted Rockwell to what he concluded (correctly) would be a dangerous accumulation of plutonium dust in the exhaust duct systems of buildings that Rockwell intended to refurbish as office space for Rocky Flats administrative workers. (Id.) And he concluded that there was a virtual absence of effective worker safety equipment in those areas of Rocky Flats where Rockwell workers handled toxic beryllium. (Id. ¶¶ 25-27 and Ex. K)

In each area outlined above, Stone personally observed the problems at issue and directly participated in analyzing and proposing solutions, virtually all of which Rockwell rejected. (Stone Aff. ¶¶ 4-27 and Exs. A, C-K) The information obtained by Stone in these three general areas, i.e., (1) surface and ground water contamination and waste treatment, storage and disposal, (2) plutonium and (3) beryllium, directly match the three primary categories of

alleged violations that underlie Stone's FCA lawsuit here, as set forth in detail in Stone's Consolidated Answers and Responses to Discovery dated October 27, 1992 (the "Consolidated Discovery Responses"). (Id. ¶¶ 3, 38 and Ex. B)

Beginning in the fall of 1986, after he was terminated by Rockwell, Stone voluntarily contacted the FBI to discuss some of the environmental, health and safety problems of which he had personally become aware during his six years at Rocky Flats. (Stone Aff. ¶ 31) During the next three years, and prior to filing this lawsuit, Stone met secretly on at least three more occasions with FBI and EPA agents and, on one occasion, with an attorney with the United States Department of Justice ("DOJ"). (Id. ¶¶ 31, 33-34 and Exs. M-O) He also had several telephone conversations with the FBI. (Id. ¶¶ 31, 34 and Ex. O) Several of these contacts were memorialized in memoranda by the FBI. (Id. ¶¶ 32-34 and Exs. M-0) Other contacts apparently were not recorded. (Id. ¶ 32)

During the course of these meetings, Stone disclosed to government authorities, among other things, much of the factual information he had learned and collected concerning the serious environmental, health and safety problems at Rocky Flats at issue in this lawsuit -- ground water contamination; storage, handling and disposal of wastes; and plutonium and beryllium health and safety issues. (Stone Aff. ¶¶ 31-34 and Exs. M-O) Stone voluntarily provided the FBI with over 2,300 pages of pertinent documents. (Id. ¶ 31) Numerous of these documents related directly to the environmental, health and safety concerns at issue in this case, as articulated in Stone's Consolidated Discovery Responses. (Compare, e.g., id. Exs. M-0 with Stone Aff. ¶ 38 and Ex. B) Stone provided the FBI with names of additional persons with likely knowledge of Rockwell's

activities, as well as recommendations as to where the FBI might best locate additional relevant documents and evidence. (Id. ¶ 31 and Exs. N-0)

In addition, in August 1986, shortly after Stone's employment with Rockwell was terminated, Stone filed a civil complaint against Rockwell for breach of contract in state court in Jefferson County, Colorado ("State Court Complaint"). (Stone Aff. ¶ 36 and Ex. P) In the State Court Complaint, Stone alleged some of the same facts concerning Rockwell's environmental problems involving wastewater, beryllium and plutonium contamination as are at issue in this FCA lawsuit. (Id. Ex. P, pp. 6, 9) The State Court Complaint was filed nearly three years before the information about Rockwell's environmental, health and safety violations at Rocky Flats became public in June, 1989, when the FBI raided Rocky Flats.

It was only after Stone's meetings with government authorities and the filing of the State Court Complaint that the search warrant was issued in connection with Rocky Flats that resulted in the publicized raid on the plant and the release on June 9, 1989 of the affidavit on which the warrant was based. (Koenigs Aff. Exs. 1, 2[1/]) The search warrant affidavit was signed by Jon S. Lipsky, the very same FBI agent with whom Stone first met, and who attended every subsequent meeting with Stone. (Stone Aff. ¶¶ 31-34 and Exs. M-O)

Finally, simultaneously with the filing of this lawsuit on July 5, 1989, Stone submitted a Confidential Disclosure Statement of Material Evidence and Information to the government (Stone Aff. ¶ 37 and Ex. Q), together with four boxes of documents relevant to the allegations in this

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[1/] Refers to the Affidavit of Christopher J. Koenigs, submitted in support of Rockwell's motion to dismiss.

lawsuit. Stone continued to supplement his Disclosure Statement with additional documentation. (Id. ¶ 37) Both the Disclosure Statement itself and the documents provided to the government made specific reference to the subjects at issue in this case. (Id. ¶ 37 and Ex. Q, pp. 9-17, 19-20, 23-30)

In short, over the course of six years, Stone obtained direct, independent, and personal knowledge of the facts underlying Rockwell's problems in the area of environmental, health and safety compliance, and the associated violations of applicable laws, in each of the specific subject matter areas at issue in this lawsuit. Based on this information -- and the fact that the government continued to permit Rockwell to operate Rocky Flats despite these facts -- Stone commenced this lawsuit alleging violations of the FCA. (Stone Aff. ¶ 35)

As we show below, based on Stone's direct and independent knowledge as set forth in his accompanying affidavit, Stone plainly satisfies the "original source" jurisdictional requirement of the FCA.

## Argument

### PLAINTIFF IS AN "ORIGINAL SOURCE" OF THE INFORMATION ON WHICH THIS LAWSUIT IS BASED

#### A. Stone Has Direct and Independent Knowledge of the Facts Underlying the Environmental, Health and Safety Issues in This Case

Where, as here, an FCA case is "based upon the public disclosure of allegations in . . . a criminal hearing . . . or from

the news media,"[2] the FCA requires: "(1) a qui tam plaintiff must have direct and independent knowledge of the information on which the allegations are based; and (2) a qui tam plaintiff must have voluntarily provided such information to the government prior to filing suit." United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992), cert. denied, __ U.S. __, 1993 U.S. LEXIS 1689 (1993) (quoted in Def. Br.[3] at 11-12).[4]

Plaintiff plainly meets both of these tests. Based on the facts and documents set forth and referred to in the Stone Affidavit, as summarized above, there can be no genuine issue that Stone had direct and independent knowledge of the environmental, health and safety issues raised by his lawsuit. He worked at Rocky Flats for six years, and he had

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[2] Plaintiff does not dispute Rockwell's contention (Def. Br. at 2-5, 9-11) that some of the allegations in this case had been publicly disclosed in a criminal investigation and/or in the news media at the time the suit was commenced. Accordingly, for those claims that arguably were publicly disclosed (i.e., some aspects of the ground water contamination, plutonium and beryllium allegations), plaintiff must satisfy the "original source" requirement of 31 U.S.C. § 3730(c)(4)(A). We therefore assume for purposes of this motion that Stone must meet the "original source" requirement for these broad areas of claims. However, Rockwell has presented no evidence whatever that Stone's claim regarding the heating and cooling of Building 250 at Rocky Flats, see Stone Aff. Ex. B, Att. 4, was in any respect public prior to Stone's suit. Thus, the "original source" rule is not triggered with respect to that claim.

[3] References are to Rockwell's Brief in Support of Defendant's Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction, dated December 15, 1992.

[4] In footnote 1 of its brief, Rockwell cites United States v. Murphy, 937 F.2d 1032, 1036-38 (6th Cir. 1991), for the proposition that Stone's claims are governed by the pre-amendment FCA. In making this argument, Rockwell ignores this Court's own prior decision holding that the 1986 amendments to the qui tam provisions of the FCA are to be applied retroactively. United States ex rel. Navarette v. Rockwell Int'l Corp., 730 F. Supp. 1031, 1032-35 (D. Colo. 1990).

virtually daily exposure to the ground water, surface water, waste treatment, plutonium and beryllium issues at the core of his case. It is difficult to imagine a *qui tam* plaintiff who better satisfies the "direct and independent knowledge" requirement of the FCA. See United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1149, 1161 (3d Cir. 1991) ("The paradigmatic 'original source' is a whistleblowing insider. This covers . . . 'individuals who are close observers [of] the fraudulent activity.'").

Nor can Rockwell genuinely dispute that Stone provided his information to the government prior to commencing his lawsuit. Stone met and spoke with the FBI and EPA on numerous occasions. He provided thousands of pages of relevant documents. He turned over still more documents as part of his confidential disclosure statement -- all prior to or simultaneous with the filing of his FCA complaint. Once again, Stone fits the definition of "original source" like a glove.

Rockwell stresses in its brief (at 8) that it is attacking subject matter jurisdiction in this case "as a matter of fact, rather than as a matter of pleadings." Yet Rockwell presents no facts that dispute Stone's direct and independent access to the information underlying his complaint. Rockwell does not (and cannot) dispute Stone's employment history at Rocky Flats. Rockwell does not (and cannot) offer any evidence that contradicts Stone's work on projects at Rocky Flats that directly relate to the alleged environmental, health and safety problems at issue. And Rockwell does not (and cannot) suggest that Stone failed to disclose this information to government authorities prior to commencing the action.

Instead, in lieu of evidence, Rockwell argues, as a matter of pure logic, that Stone must have lacked direct and independent knowledge of the environmental, health and

safety issues in this case because some of his allegations track the allegations made public in the investigations conducted by the FBI, EPA and DOJ. (Def. Br. at 13-14) ("Stone based his FCA claim on information developed by the Government in its own investigations . . . .") Further, Rockwell asserts that Stone has "admitted" that his case is based "almost entirely" on information developed by the government because Stone cites to government sources in his Consolidated Discovery Responses. (Id. at 14)

Rockwell's logic is flawed. The fact that certain of Stone's allegations of environmental, health and safety violations in part match those made public by the FBI, EPA and DOJ proves nothing where, as here, Stone had direct and independent knowledge of the underlying facts and reported them to the government before the allegations were made public.[5/] Stone's prior knowledge is corroborated by the fact that his State Court Complaint, which makes allegations concerning contaminated wastewater, beryllium and plutonium, was filed nearly three years before the outbreak of publicity involving the criminal investigation into Rocky Flats. (Stone Aff. ¶ 36, Ex. P, pp. 6, 9) Thus, if

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[5/] To the extent Rockwell contends that certain press articles (Koenigs Aff. Att. 10) dated prior to the filing of Stone's state court case constitute a "public disclosure" that precludes Stone from bringing this lawsuit, it is also incorrect. Even assuming that such articles, which describe in general terms some problems relating to the ground water at Rocky Flats, made the allegations in this case public, the "original source" rule does not require that the relator provide information to the government prior to any public disclosure of the allegations on which the suit is based. The FCA requires only that the relator have "direct and independent knowledge" of the information and have voluntarily provided such information to the government. See United States ex. rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992), cert. denied, __ U.S. __, 1993 U.S. LEXIS 1689 (1993). Stone plainly meets this test irregardless of the existence of any general press articles addressing certain environmental problems at Rocky Flats.

probative of anything, the similarity between Stone's allegations and those in the various government investigations into Rocky Flats is persuasive evidence that Stone's disclosures were, at least in part, a foundation on which the government's subsequent investigations were themselves based.

Carrying the logic of its argument to its ultimate conclusion, Rockwell charges Stone with "plagiarism" because his Consolidated Discovery Responses allegedly "copy" the allegations in the federal search warrant affidavit for Rocky Flats and the Government's sentencing memoranda in United States v. Rockwell. (Def. Br. at 15) But as a proper qui tam plaintiff who is an original source of the information underlying his complaint, Stone has every right to make full use in this litigation of every scrap of evidence developed by independent government agencies in the course of their various investigations into Rockwell's illicit activities. Cf. 31 U.S.C.§ 3731(d) (permitting a qui tam plaintiff to obtain the benefits of a defendant's prior guilty plea to fraud or false statements in a subsequent civil FCA case). Once jurisdiction is established, the "original source" requirement does not require a qui tam plaintiff to close his eyes and litigate the case armed solely with the information he personally learned before commencing his action.

For this reason, Rockwell's analogy between this suit and the kind of "parasitic" "copycat" suit typified by United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), is off the mark. (Def. Br. at 12-14) In Marcus, there was no evidence whatever that the purported qui tam plaintiffs had any direct or independent knowledge of the allegations of wrongdoing on which their complaint was based. On the contrary, it was undisputed that their sole source of information was a public criminal indictment. Because the FCA statute in effect in 1943 at the time of Marcus did not

contain an original source requirement, however, the plaintiffs sere permitted to pursue their action even though, as the Second Circuit recently noted, the plaintiffs' action was "based solely on information already uncovered in the government's investigation . . . ." United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992) (citing Marcus, 317 U.S. 537 (1943)).

Here, by contrast, Stone had direct and independent knowledge of the essential facts underlying the environmental, health and safety issues in this lawsuit, and he reported these facts to the government before commencing his case. Unlike the plaintiffs in Marcus and Doe, Stone is not "capitaliz[ing] on public information" without "seriously contributing" to disclosure of the defendant's misdeeds. Doe, 960 F.2d at 321. On the contrary, Stone contributed greatly to the public disclosure of Rockwell's actions by meeting on several occasions with the appropriate government authorities, including the very FBI agent that signed the search warrant affidavit that ultimately resulted in Rockwell's guilty plea to ten environmental crimes.

Rockwell's repeated charges of "plagiarism" (Def. Br. at 14, 15) -- with full knowledge of Stone's work history and disclosures to government authorities -- is disingenuous, at best.

B. The FCA Does Not Require That Stone Have Direct and Independent Knowledge of the Particular False Statements or Omissions at Issue

Rockwell's fallback argument is that, even if Stone did have direct and independent knowledge of Rockwell's environmental, health and safety problems, he still is barred as a qui tam plaintiff because he did not have direct and independent knowledge of Rockwell's specific "false statements and concealments" to the government. (Def. Br.

at 15-17) According to Rockwell, because Stone cannot presently identify all of the specific false statements or fraudulent omissions that Rockwell made to the government regarding environmental, health and safety compliance, "Stone cannot possibly satisfy the FCA's 'direct and independent knowledge' test." (Id. at 17)

Rockwell's proposed reading of the "original source" provision is wrong as a matter of law. It is inconsistent with the FCA's statutory language, its legislative history, the applicable caselaw, and common sense.

The "original source" provision of the FCA requires that a qui tam plaintiff have "direct and independent knowledge of the information on which the allegations (of the complaint) are based." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). By contrast, § 3729(a)(2) -- the liability section of the FCA -- specifically requires that the plaintiff demonstrate as an element of his claim that the defendant knowingly made a "false" or "fraudulent" statement to get a claim paid. By its plain language, therefore, the "original source" provision of § 3730 does not require that a plaintiff necessarily have direct and independent knowledge of the alleged false statements or concealments that § 3729 specifically requires as an element of liability.

Had Congress intended to require a qui tam plaintiff to possess direct and independent knowledge of the specific misrepresentations or concealments at issue – as opposed to knowledge of the underlying information that renders the statements false or fraudulent – Congress easily could have used the term "false statements" in the 3730(e)(4)(B) definition of "original source." But it didn't. Congress chose instead to employ the broader term "information" in the § 3730 definition of "original source." As one Circuit Court put it: "Congress, if it wished to do so, could have limited the statute in the manner suggested by [Rockwell]. . . .

Congress was not so specific when drafting the statute. We must interpret the statute as it is written, not how [Rockwell] wishes Congress had drafted it." United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1504 (11th Cir. 1991) (quoting United States v. Rawlings, 821 F.2d 1543, 1546 (11th Cir. 1987)).

Plaintiff's reading of § 3730 is fully consistent with the legislative history of the FCA. Congress intended that persons such as Stone, who are close observers of a government contractor's misconduct and who voluntarily come forward with such information, be entitled to bring suit as qui tam plaintiffs. See S. Rep. No. 345, 99th Cong., 2d. Sess. at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269, cited in United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1161, 1154 (3d Cir. 1991); False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (statement of Sen. Grassley), cited in Stinson, 944 F.2d at 1154.

Indeed, it is no exaggeration to characterize Stone as the archetype qui tam plaintiff -- the "whistleblowing insider" -- that Congress envisioned when it enacted the FCA. See Stinson, 944 F.2d at 1161. There is no suggestion in the legislative history that Congress intended to bar an insider like Stone from commencing an FCA case merely because his job did not afford him firsthand knowledge of the specific misrepresentations that form an element of his claim.

Moreover, plaintiff's view of the "original source" requirement is consistent with the statute's remedial purpose. The sole reason Congress chose in 1986 to create an "original source" requirement was to prevent qui tam plaintiffs who had no first-hand knowledge of the facts at issue from capitalizing on already public disclosures of alleged wrongdoing by government contractors. See United

States ex. rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992); Stinson, 944 F.2d at 1164. But where, as here, it is undisputed that the plaintiff is no "stranger" to the case, but, in fact, was intimately involved for six years with the specific environmental, health and safety problems at issue, no further conceivable purpose, consistent with the intent of Congress, is served by reading the statute so narrowly as to deprive the Court of jurisdiction. For, in the last analysis, it is the claims of the United States Government, not Mr. Stone's personal claims, that would be prejudiced if this case were dismissed on jurisdiction grounds.[6/]

Plaintiff's reading of the "original source" requirement also comports with a common sense understanding of the statute. Imagine a government contract that required the manufacture and delivery of solid gold widgets. If an employee on the factory floor discovered that the contractor was using gold-plated lead instead of pure gold to manufacture the widgets, and reported this fact to the government, he surely would satisfy the "original source" requirement of the statute. This would be true irrespective of whether he had any direct or independent knowledge of the precise invoices or certifications that the contractor had submitted to the government falsely representing that the widgets were, in fact, made of 100% gold. So, too, here, the fact that Stone had no personal knowledge of the particular

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[6/] It is important to note in this regard that in the plea agreement with Rockwell in United States v. Rockwell (attached hereto), the government released all civil claims it had against Rockwell relating to environmental matters at Rocky Flats which were presently known to the government on the date of the plea agreement, except, among others, those claims raised in this FCA action, which is specifically carved out as an exception to the government's release. (Att. 1, pp. 2-3) Thus, a dismissal of this action on jurisdiction grounds, for all practical purposes, arguably is a dismissal of all FCA suits against Rockwell relating to the environmental issues raised in this case.

misrepresentations that Rockwell made to the government regarding environmental, health and safety compliance at the time he commenced his suit does not disqualify him as an "original source" under the statute.

The cases also are consistent with plaintiff's interpretation of the "original source" requirement. In Wang ex rel. United States v. FMC Core., 975 F.2d 1412 (9th Cir. 1992), the plaintiff was an engineer formerly employed by the defendant, FMC Corporation ("FMC"). While in FMC's employ, Wang had prepared a four-page report suggesting proposals to remedy FMC's problems with the transmission of a multiple launch rocket system it was manufacturing under contract with the United States. The Ninth Circuit held that Wang's knowledge obtained through his work on this project satisfied the "direct and independent" requirement of the "original source" provisions of the FCA statute because he:

> had personal knowledge of the . . . transmission problems because he worked (however briefly) on trying to fix them. . . . Wang's knowledge of the transmission problems was "direct and independent" because it was unmediated by anything but Wang's own labor.

Wang, 975 F.2d at 1417.

Significantly, the Wang court nowhere suggested that the plaintiff need also have had direct and independent knowledge of the particular alleged false statements or concealments that FMC made to the government about the compliance of the multiple launch system with contract specifications. It was enough that Wang, like Stone, had direct and independent knowledge of the underlying problems. In both instances, the plaintiff reasonably could infer that these facts were not being truthfully disclosed to the government in order to get paid. Rockwell, on the other

hand, can point to no reported case where a qui tam plaintiff with direct and independent knowledge of the underlying contract violations was nevertheless barred as an "original source" because of lack of knowledge of the specific false statements at issue. See United States ex rel. Stinson v. Prudential Insur. Co., 944 F.2d 1149, 1160 (3d Cir. 1991) ("Undoubtedly, it is not necessary for a relator to have all the relevant information in order to qualify as 'independent.' . . . A party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure." (emphasis added)).

Finally, Rockwell's proposed distinction between knowledge of the underlying environmental problems and knowledge of the specific misrepresentations or concealments would have the practical effect of repealing the private enforcement provisions of the FCA. In the real world, qui tam plaintiffs such as Stone -- who work on the shop floor and observe, first hand, the fraudulent practices of government contractors -- rarely, if ever, have direct contact with a contractor's specific written submissions to the government. Conversely, a contractor's office employees who are responsible for the reams of paperwork submitted to the government in order for the contractor to be paid will just as rarely, if ever, have first-hand knowledge of the kinds of fraudulent manufacturing practices that typically form the core of an FCA case. Under Rockwell's narrow reading of the statute, both the laborer on the factory floor, as well as the office worker drafting submissions to the government, would be disqualified as proper qui tam plaintiffs because each, in his own way, would lack the full scope of "direct and independent" knowledge that Rockwell asserts is required to prosecute an FCA claim.

This result, we submit, is not what Congress intended, not what the statute says, and not what the courts have held.

## Conclusion

For all of the foregoing reasons, plaintiff respectfully requests that Rockwell's motion to dismiss be denied, and that the Court enter an Order finding that subject matter jurisdiction exists based on plaintiff's status as an original source of the information on which the allegations of his case is based.

Dated: New York, New York
March 5, 1993

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

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**DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF JAMES S. STONE**

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* * *

6. State whether you have had any oral or written communication concerning any subject relating to the Rocky Flats Plant with: (a) any Government Employee (including without limitation any agent of the United States Federal Bureau of Investigation, any employee of the United States Attorney's Office for the District of Colorado, any employee of the United States Department of Justice, or any employee of the United States Environmental Protection Agency); or (b) any member of the Special Federal Grand Jury investigating Rocky Flats, excluding formal testimony before the Grand Jury. If your answer to this interrogatory is other than an unqualified negative, with respect to each such communication:

a. Identify the person who initiated the communication;

b. State the date(s) and location(s) of the communication;

c. Describe the nature of the communication, e.g., meeting, telephone conversation, letter, written statement;

d. Identify all persons who were present at and/or participated in the communication;

e. Describe with particularity the substance of the communication;

f. Identify all documents that were reviewed, examined, discussed or referred to in the course of the communication; and

g. Identify all documents that evidence, relate to or support the existence of the communication.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA
ex rel., and JAMES S. STONE,

Plaintiffs,

vs.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation,

Defendant.

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**PLAINTIFF JAMES S. STONE'S THIRD SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

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The Plaintiff, James S. Stone, by and through his attorneys, HARTLEY DAVID ALLEY; BUCHANAN, GRAY, PURVIS AND SCHUETZE; McDERMOTT, HANSEN AND REILLY; and BREIT, BEST, RICHMAN AND BOSCH, P.C., hereby submits the following third supplemental responses to Defendant's First Interrogatories and Requests for Production of Documents:

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1:

Re: Groundwater contamination, spraying of pollutants, operations concerning solar evaporation ponds, and Rocky Flats sewage treatment plant.

a) Contamination of ground water in numerous ways, spraying of pollutants upon open fields, causing discharge of

pollutants onto the ground and into the groundwater, discharge of pollutants from and into solar evaporation ponds, and illegal usage of the Rocky Flats sewage treatment plant to treat contaminants and production waste.

Based upon a course of conduct, Plaintiff believes many of the violations were virtually continuous since 1976. The dates of these violations may be in documents held or controlled by Defendant; nevertheless, it appears that Rockwell has consistently failed to abide by the requirements of RCRA since its inception in 1976, by treating, storing and disposing of hazardous wastes without complying with RCRA, 42 U.S.C. §6901 et seq. and The Clean Water Act, 33 U.S.C. §1251 et seq. No hazardous waste permit was obtained nor did the facility attain "interim status" at critical times. 42 U.S.C. §6924 and 6925. By its specific language, RCRA applies to all Federal facilities. 42 U.S.C. §6961.

a) b) c) e) and f) To date Stone is able to identify the following documents and facts related to the existence of these violations:

1. DOE Order 5480.2 (Dec, 13, 1982);

2. Legal Environmental Assistance Foundation v. Hodel, 586 F.Supp. 1163 (E.D. Tenn. 1984);

3. 10 C.F.R. Part 962;

4. Rocky Flats RCRA permit application (Nov. 19, 1980);

5. June 17, 1981 notice from EPA to DOE Area Manager Don Ofte that Rocky Flats' Part A application was incomplete;

6. July 21, 1981 response to EPA from Earl Bean of DOE requesting withdrawal of Part A permit application;

7. EPA response to DOE dated 12/15/91 re

"determination of whether permit is needed is your responsibility";

8. EPA-CDH inspection of 6/7/83 showed 21,500 pounds of RCRA hazardous waste, which greatly exceed allowable accumulation of small generator; DOE/Rockwell did not have a permit or interim status to treat, store or dispose of such wastes;

9. One 6/7/83, EPA/CDH noted twenty 55-gallon drums of hazardous wastes stored at RFP without permit since April 1982, a violation of 42 U.S.C. 6928 (d)(2) and an apparent RCRA felony;

10. On 7/18/83 DOE reported to EPA that it had withdrawn its Part A application in error since RFP did store solvents and other wastes for more than 90 days, thus indicating RFP was operated as an unpermitted and illegal facility from mid-1981 through July 1983;

11. The resubmitted Part A application estimated RFP generated, stored or otherwise accumulated approximately 13,000 pounds of hazardous wastes at RFP. Information obtained by EPA showed, in fact, that RFP generated or accumulated at best 25,227 pounds of RCRA hazardous waste in 1984, nearly twice the sum estimated in 1983;

12. RFP's revised Part A application estimated that RFP generated more than 31.6 million pounds of mixed wastes (Nov. 8, 1985) and for the first time made referral to radioactive mixed waste "land disposed units", including "spray irrigation" of wastes on open fields;

13. Part of RFP's 11/8/85 RCRA submission is Rockwell's certification that its RFP groundwater monitoring system complied with RCRA requirements. This certification was demonstrably false in light of information then known to RFP officials that three days

prior to this certification a GAO Report referred to RCRA wells as "proposed as part of future RCRA compliance." CDH inspectors tested the available wells less than one month after RIC representations and found that system inadequate, and RIC's own consultants concluded that REP could not demonstrate compliance with RCRA groundwater regulations under 40 C.F.R. §265.91(c);

14. DOE Order No. 5480.2 dated 12/13/82 required groundwater monitoring systems be established at all DOE facilities in accord with RCRA regulations at 40 C.F.R. Part 264, Subpart F, and Part 265, Subpart F;

15. Rockwell reported on 11/9/84 that RCRA monitoring wells were contaminated by salt poured into them in April 1983;

16. Rockwell was implementing or at least studying implementation of waste spraying/irrigation to dispose of contaminated groundwater, waste water and plant runoff as early as 12/80 and perhaps earlier. Stone was assigned to/and did work on aspects of the project as early as Dec. 1980. This spray irrigation of contaminants onto various fields at RFP used treated wastewater, contaminated groundwater and plant runoff and was virtually continuous until 1990.

17. These spray fields received waste water from the solar ponds and their accumulated industrial wastes, contaminated groundwater, as well as sewage plant effluent. The west spray field was closed in 1985 as a RCRA contaminated site and thereafter more wastewater was sprayed on a smaller area in the east, north and south spray fields.

18. In October 1984, Rockwell violated the RFP NPDES permit when nitrate-contaminated water from the west spray field ran off the field into McKay Ditch and

flowed downstream below permitted outfalls. Ongoing overspraying of these fields caused subsequent runoff to enter Woman Creek.

19. RIC virtually perpetually recharged the alluvial groundwater around the contaminated east trenches by spraying approximately 80 million gallons a year despite minimal evaporation loss and poor soil uptake. The spraying continued even after the search warrant of 1989 and was not terminated until 1990;

20. Air monitoring analysis over well 9-81 showed the presence of volatile organic vapors exceeding background levels, sufficient to require the sample team to wear protective suits and respirators;

21. Hydrogeologic site characterization by RIC shows that alluvial groundwater flows northeast toward the Walnut Creek drainage, and that the in-place interceptor trench system may not be adequate to capture all alluvial groundwater originating in the area of the ponds. Action Description Memorandum 11/16/89, Action description Memorandum for Solar Evaporation Pond Closure 6/16/89;

22. A screening of RFP groundwater including drinking water, surface water and groundwater occurred March and April 1985 and found volatile organic compounds in the RFP groundwater, including 6,400 ppb of trichloroethane (CEARP at v.47). The Safe Drinking Water Act, 42 U.S.C. §300f, et seq., has set maximum contaminants at zero for trichloroethylene and 200 ppb for 1,1,1 trichloroethane;

23. The RFP facility does not have a groundwater monitoring system which meets the requirements of 6 C.C.R. 1008-3 Part 264 and Part 265 according to the CDH;

24. The presence of hazardous waste in

groundwater constitutes disposal within the meaning of 6 C.C.R. 1007-3 Section 260.10;

25. A memorandum confirms that a groundwater monitoring system at RFP is essentially nonexistent and confirms that some of the waste facilities at RFP are illegal;

26. RCRA legislation required a minimum of three down gradient groundwater monitoring wells at the limit of a waste management area pursuant to 40 C.F.R. §265.91(a)(2). The RFP Part B application dated 11/28/86 notes the closest wells to the solar ponds as of 11/85 to be from 170 ft. to 580 ft. to the ponds, contrary to RCRA requirements;

27. RFP's groundwater monitoring system was not in compliance with RCRA requirements when RIC certifications were made and are grossly deficient. What was required was an assessment monitoring system under 40 C.F.R. §265.93(d). These deficiencies were noted to RIC prior to RIC's certification that they were in compliance;

28. Rockwell's NPDES reporting forms (form 2C) (1979) listed 17 potential pollutants in the RFP sewage treatment plant effluent. Thereafter, RFP applied for and received NPDES permits stating that the STP received only domestic sanitary waste, cooling tower blowdown and steam condensate, no indication of industrial or hazardous wastes.

29. Despite this, RFP's RCRA Part A application lists the STP as a RCRA hazardous waste treatment unit and acknowledges that some hazardous wastes may be entering the sanitary waste collection system. Treated sewage sludge identified hazardous wastes which should have been listed as pollutants in the RFP NPDES permit, including among others, ignitable and corrosive wastes, beryllium dust, halogenated and non-

halogenated solvents, acetone, methylene chloride, EP toxic silver, cadmium, chromium and mercury wastes.

30. RCRA requires compliance with Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations 6 C.C.R. 1007-3 Parts 265 and 270. Hazardous wastes are identified in 6 C.C.R. 1007-3 Part 261. The Clean Water Act, 33 U.S.C. §1251 et seq. prohibits the discharge of any pollutants into the waters of the United States except in accord with an NPDES permit.

31. A Rockwell document entitled, "Waste Stream Identification and Characterization" (WSIC) showed that 53 industrial or non-sanitary wastes including EP toxic photographic solutions, acid rinses and EP toxic cooling tower blowdown were present in and being disposed of in the sewage treatment plant.

32. RFP's NPDES Permit, Part III (Other Requirements, Management Practices Plan) and Part II, Section A, paragraph 3 (Facilities Operation) required Rockwell to prevent or minimize the potential for toxic and hazardous releases to comply with NPDES terms and conditions.

33. The numerous toxic substances discharged into the STP greatly impaired the STP's performance, a chronic problem at RFP, due to a sludge buildup compromising effluent standards.

34. RFP's 1984 NPDES Permit, Part I, Section A, paragraph 1 (Effluent Limitations – Outfall No. 001, Discharge from Pond 3 and Part III, Section A, paragraph 5, were violated by Rockwell's bypassing facilities to maintain compliance with the terms of the permit.

35. Stone documents #'s 4, 5, 6, 7, 8, 9, 10, 11, 15-25, 113-115, 117-118, 276, 410;

36. The solar evaporation ponds are a series of

five evaporation ponds used to store and treat liquid process wastes containing high nitrates and treated acidic wastes containing aluminum hydroxide, sanitary sewage sludge, lithium chloride, lithium metal, sodium nitrate, ferric chloride, sulfuric acid, ammonium persulfates, hydrochloric acid, nitric acid, chromium, tritium and cyanide in solution, all hazardous mixed wastes.

37. Due to leaking of these solar ponds, underground interceptor trenches were installed to attempt to control seepage of contaminants into surrounding groundwater. These ponds were not listed on RFP's original RCRA Part A application and no permit or interim status to treat or store hazardous or mixed wastes were granted pursuant to RCRA.

38. Vacuum filter sludge was generated from various processes at RFP, a low-level hazardous waste toxic for cadmium, chromium and other listed hazardous wastes. This sludge was stored without RCRA compliance;

39. Commencing circa 1985, and perhaps earlier, sludges from the solar ponds were removed from time to time, mixed with Portland cement and calcium chloride and packaged as a mixture of sludge and concrete for storage and later shipping offsite. The methodology of sludge removal was reviewed by Stone in 1982 and he observed that the process would not work. Stone documents, #276;

40. Despite knowing that the make-up of the east trenches was plutonium-contaminated drums, various solvents and uranium-contaminated sewage, Rockwell sprayed large quantities of water onto the site or near the site, sending large volumes of water into the groundwater of the area, thereby contaminating the ground water of the area, despite testing of the groundwater of the area which in 1981 showed elevated nitrates, chlorine and fluoride.

41. On a scale of 1 to 10, DOE has rated groundwater contamination at RFP as a nine. DOE Environmental Survey, (Sept. 1988) at ES-2. According to DOE, groundwater contamination at RFP represents the greatest single environmental hazard at all of DOE's nuclear facilities.

42. Additional documents include:

(a) Comprehensive Environmental Assessment and Response Program (CEARP) Phase 1 (April 1986);

(b) CEARP Phase 2 (July 1986);

(c) Preliminary prioritization of sites, July 21, 1986;

(d) CEARP Phase 2 Monitoring Plan and Sampling Plan (July '86);

(e) CEARP Phase 2 Technical Data Management Plan (July '86);

(f) CEARP Phase 2 Health & Safety Plan (July '86);

(g) CEARP Phase 2 QA/QC Control Plan (July '86);

(h) Closure Plan Solar Evap Ponds (8/29/86);

(i) Assessment of Environmental conditions at RFP (Aug. 1989);

(j) Environmental Report for 1989 - EG&G;

(k) RFP FY 1990 Site Specific Plan - EG&G;

(l) Federal Facility Consent Order RFP.

d) At present, available information is unclear as to which specific Rockwell employees had knowledge of

enough facts to constitute knowledge of a violation; Plaintiff reported his numerous complaints and observations directly or through reporting channels to Bill Nichol, Sam Cerise, Bob Jensen, Tony Eden, Dave Guffy, Bob Morrison, Chuck Rose, Ken Shirk, Norm Anderson, and others not presently recalled within his unit. Other knowledgeable persons may be Dennis Murphy, John Hanchley, D.E. O'Neil and William Marschal.

e), f) & g) Pending completion of discovery, Plaintiff is unable to identify each provision violated; however, the following appear to have been violated:

1. DOE 5480.2 (Dec. 13, 1982) (Hazardous, Toxic and Mixed Waste Mgmt.) AL 5480.2 (Hazardous, Toxic and Mixed Waste Mgmt.);

2. 10 C.F.R. Part 962;

3. 42 U.S.C. 6928(d)(2);

4. 40 C.F.R. Part 264 Subpart F and Part 265 Subpart F;

5. 42 U.S.C. §300 et seq.;

6. 6 C.C.R. 1008-3 Part 264 and Part 265 and Part 270;

7. 6 C.C.R. 1007-3 Section 260.10;

8. 40 C.F.R. §265.91(a)(2);

9. 40 C.F.R. §265.93(d);

10. DOE Order 5481.1A;

11. DOE Order 6430.1;

12. National Pollutant Discharge Elimination System (NPDES) permits issued pursuant to 33 U.S.C. §1342;

13. 42 U.S.C. §6901 et seq. (RCRA) especially 6928 (d)(2)(c);

## VERIFICATION

STATE OF COLORADO )
) ss.
COUNTY OF BOULDER )

I, James S. Stone, being sworn, do hereby state that the foregoing Plaintiff James S. Stone's Third Supplemental Responses to Defendant's First Interrogatories and Requests for Production of Documents are true and correct to the best of my knowledge, information and belief.

/s/ James S. Stone
James S. Stone

SUBSCRIBED AND SWORN to before me this 5th day of June, 1992, by James S. Stone.

My commission expires: 4/5/94.

/s/ Shelly A. Thomas
Notary Public

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

---

PLAINTIFF JAMES S. STONE'S AMENDED RESPONSES TO INTERROGATORY NOS. 1(d), (1), (m), (n) AND (o), 5, 6, 7, 11(a), 12-16, 21(d), AND 23 (a), (b) AND (d) OF DEFENDANT'S FIRST INTERROGATORIES

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Plaintiff James S. Stone ("Stone"), by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and Breit, Best, Richman and Bosch, P.C., hereby submits the following amended responses to Interrogatory Nos. 1(d), (l), (m), (n), and (o) ,5, 6, 7, 11(a), 12-16, 21(d) and 23 (a), (b) and(d) of Defendant's First Interrogatories:

Interrogatory No. 1 (d), (l), (m), (n), and (o):

d. Identify all Rockwell Employees who you contend had actual knowledge of the facts constituting the violation at the time Rockwell submitted any claim to the Government that you contend was false;

l. State whether you contend that Rockwell affirmatively misrepresented to the Government that it was in compliance with the Environmental and Safety Laws (including regulations thereunder) and Agreement that you contend were violated by

virtue of such facts;

m. If your answer to subpart (l) above is other than an unqualified negative, identify (in accordance with Instruction Nos. 9-10 above) each document or oral communication in which Rockwell made such misrepresentation to the Government;

n. State whether you contend that Rockwell concealed from the Government the facts constituting the violation of the Environmental and Safety Laws and Agreements;

o. If your answer to subpart (n) above is other than an unqualified negative; (i) identify all Rockwell Employees who to your knowledge concealed the violation from the Government, and (ii) identify all documents supporting your contention that Rockwell concealed the violation from the Government;

Amended Response to Interrogatory Nos. 1(d), (l), (m), (n) and (o):

The persons identified in the "Individuals" column of Attachments 1 through 4 of Plaintiff's Consolidated Answers and Responses to Discovery are persons whom Stone believes had actual knowledge of some facts constituting the violation at the time Rockwell submitted false claims to the government. Concerning Instruction No. 8, neither Stone nor his attorneys know the current address, telephone number, or employer of the individuals listed in Plaintiff's Consolidated Answers and Responses to Discovery.

Stone does not know the identities of specific persons who may have either affirmatively misrepresented to the government that Rockwell was in compliance with the Environmental and Safety Laws and Agreements which it had in fact violated, or concealed such violations from the government. Also, Stone does not know the identities of specific documents which contain affirmative misrepresentations or, when taken as a whole with other submissions by Rockwell, reflect concealment of these

violations. However, under the terms of the contracts between Rockwell and the U.S. Government relative to the operation of RFP (and Modifications thereto) previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, Rockwell was required to comply with all laws and regulations of the United States, which include laws, statutes and regulations governing the environment, health and safety. Furthermore, Modification 111 to the base contract, previously identified in the "Nexus" column of Attachments 1-4 to Plaintiff's Consolidated Answers and Responses to Discovery, requires that Rockwell affirmatively certify such compliance. Accordingly, all conduct by Rockwell in seeking to receive funds from the government in payment of fixed fees, base fees and award fees, as well as GAO payments, under the respective agreements relative to the operation of RFP, when Rockwell knew that it was in violation of applicable environmental, safety and health laws, constitutes knowing misrepresentation and concealment of the actual facts from the government.

Interrogatory No. 5:

With respect to your allegations, set forth in paragraphs 15 and 20 of the Complaint, that Rockwell conspired with others to (a) defraud the Government in order to obtain approval of a false or fraudulent claim, and (b) conceal the true nature and extent of its

* * *

[seal omitted] **U.S. Department of Justice**

United States Attorney
District of Colorado

Byron G. Rogers Federal Building (303) 844-2081
Twelfth Floor, Drawer 3615
1961 Stout Street FAX 844-2308
Denver, Colorado 80294

**SUPPLEMENT TO**
**STATEMENT OF**
**MICHAEL J. NORTON**
**UNITED STATES ATTORNEY**
**DISTRICT OF COLORADO**
**NOVEMBER 18, 1992**

The facts about the prosecution of Rockwell International corporation for criminal violations of this Nation's principal hazardous waste and water pollution laws while operating the Rocky Flats Nuclear Weapons Plant are as follows:

1. THE JUSTICE DEPARTMENT PROSECUTED ALL SERIOUS CRIMES FOUND AT ROCKY FLATS AND ACHIEVED A RECORD RESULT.

As to the facts of the prosecution, on March 26, 1992, following a lengthy criminal investigation by the FBI and the EPA, Rockwell pleaded guilty to ten environmental criminal violations which called for record criminal fines of $18.5 million.

These criminal fines, payable to the United States and to Colorado, led Colorado's Governor Roy Romer to say, "I believe the amount of the fine, one of the largest of its kind in the history of this state and of this nation, is appropriate given the nature of the violations."

A ten count information charged 330 separate instances of knowing felonious conduct and 80 separate instances of

criminal misdemeanor negligence during 1987 to 1989. These charges represented the most serious environmental crimes developed by our investigation for which a sufficient legal basis and credible evidence existed which we believed could result in and sustain a successful prosecution and conviction.

On June 1, the Chief Judge, after concluding that the plea agreement and fine "is just and fair and is in the public interest," imposed the largest hazardous waste criminal fine ever in U.S. history.

As Colorado's United States Attorney, I share with all Coloradans a deep and abiding commitment to the environment and to our mountains, our water, our air, and our other precious natural resources.

My office and I have been national leaders in prosecuting environmental crimes, achieving, for example, the first-ever criminal conviction in the Nation under the "knowing endangerment" provisions of RCRA.

That is why, even though Rocky Flats has been politically and publicly controversial and the most analyzed facility in Colorado's history, we were ready, willing, and able to take on the incredible challenge of this complex criminal investigation.

The early information we learned caused me to believe that serious environmental crimes may have occurred which presented possible significant threats to the environment and public health of citizens near Rocky Flats.

Having lost my oldest son to leukemia in 1983, I was more than ready to believe that these public health threats were real.

I believed this mandated significant action on our part and, in June 1989, a massive search warrant was executed to determine whether suspected environmental crimes had occurred.

During the 3½ year investigation, our investigative team analyzed more than three and one half million pages of documents and interviewed hundreds of witnesses.

From the beginning our investigative goal was to seek out and prosecute any serious environmental criminal conduct we found which was characterized by deception or which could have been avoided by alternate, available technology.

What we found was that, in consideration of national defense goals, an institutional "culture" shrouded in secrecy had prevailed over the years at Rocky Flats, which, until changed by the Secretary of Energy in 1989, resulted in nuclear weapons production receiving paramount priority, while environmental compliance was far down the list of concerns.

We found no evidence of any significant off-site physiological threat to the environment or to the public health not already known to the regulators and thus being addressed.

Unlike most criminal investigations, at no time during the course of this intense and complex investigation did any knowledgeable "insider" come forward to identify serious environmental criminal conduct or give useful inculpatory information which would corroborate the alleged crimes of others. This meant that any criminal case necessarily rested on stringing together thousands of documents to create inferences of criminality. Almost always, even in the most complex criminal investigation, someone eventually "cracks" and steps forward to provide an "insider's" cooperation. That simply did not happen here.

* * *

Boulder Daily Camera

## Pat Schroeder calls Flats whistleblower 'a hero'

By Bill Scanlon
Camera Staff Writer

The man who says he blew the whistle that led to the FBI investigation of Rocky Flats was for six years the engineer who wrote reports no one wanted to see.

"I told them where the problems were," former Rocky Flats engineer Jim Stone told the Daily Camera. "I saw things people didn't want me to see."

U.S. Rep. Pat Schroeder on Friday night called Stone "a hero," who ought to be saluted for risking his career to tell the truth. Stone was fired in 1986 after six years at the plant. He was identified on a copyright KMGH-Channel 7 report Friday as the whistleblower who sparked the FBI probe two years ago.

Stone could not be contacted Saturday. In an earlier interview with the Daily Camera, he described the problems he observed at the plant.

"My job was to write weekly reports," said Stone. "I was in charge of engineering problems for the whole plant."

Stone described Building 771, the main plutonium recovery center, as being "held together with chewing gum and baling wire very seriously contaminated."

Among other things, plant and Department of Energy officials ignored his recommendation that a trench be dug to intercept contaminated soil before groundwater flushed it to Walnut Creek or Woman Creek, [illegible]id. Those two creeks dump into reservoirs that serve the people of Broomfield, Westminster, Thornton and Northglenn.

In the 1950s and 1960s, hazardous waste was simply buried on site, over time contaminating the soil, he said.

Former plant operator Dow Chemical Co. [illegible]d their mistakes," said Stone.

Groundwater running through the plant [illegible]ts the

contaminated soil and carries it
(See SCHROEDER, Page 7A)

**(From Page 1A)**

toward the creeks.

"I suggested putting in a corrugated-iron interceptor trench – 10 to 20 feet deep to the bed-rock – so it wouldn't get to the creeks," he said.

Stone also was ignored when he told top officials that Building 881 shouldn't be using an air conditioner to recycle contaminated air. He suggested a new type of air conditioning system that could do it safely, but the plan was rejected. "Their feeling is that once you design it, changing your mind is stupid. They'll do anything not to lose face. T[illegible]

Stone, early in his tenure at Rocky Flats, realized that the instruments that were supposed to measure the level of highly toxic beryllium were deliberately set in spots too far from the beryllium machines to detect anything.

"Year after year, they didn't catch anything," said Stone. "But I could see it on the machines, their clothes, their hair. I told them, 'you're monitoring areas that are not polluted.'"

Finally, Rockwell International accepted Stone's simple suggestion to wet the beryllium so when it is sanded, dust won't fly into the air.

Rockwell ran the plant, hiding problems from DOE, usually not including DOE officials at meetings, Stone maintained.

"At meetings, there was always the reprimand: 'Never allow a DOE engineer to have any idea we have a problem.'"

Stone says he suggested numerous new technologies to improve safety and production, but was rebuffed each time.

The groundwater monitoring system needs more wells – and in the right places – to detect radiation, he said.

"If we don't have the talent to do it right, we shouldn't be making the weapons," he said.

Stone said Building 771, the main processing building that was shut down for three months last winter, was

"extremely contaminated" when he worked there. He wrote a report, saying it needed more exits than it has, but was "reprimanded for not being a team player."

Dave Guffey, utilities manager for 771 until his retirement in 1983, said Saturday that Stone "was an excellent engineer who got a real shafting out there. He may have had some personal grudges, but he is a very sincere, very honest person."

Guffey described Rocky Flats as "one of the safest plants in the country from an industrial safety point of view. There is a lot of difference between industrial safety and radioactive safety."

Stone has moved out of state but last week flew back to Colorado.

He told Channel 7 that top Rocky Flats officials "absolutely" knew of hazardous and radioactive waste contamination problems. "They absolutely knew it. They absolutely lied about it and the bastards should be sent to jail."

He said he was convinced such orders came "from the top," but he refused to identify those individuals by name. "I can't say that; I'd rather shoot them dead," he said.

An FBI affidavit made public Friday said two former employees were the source of information leading to the investigation.

[FILED]
[U.S. DISTRICT COURT
[DISTRICT OF COLORADO]
['95 NOV 14 A8:43]
[JAMES R. MANSPEAKER CLERK]

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, Plaintiffs, | ) | |
| v. | ) | Case No. 89 C 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, Defendant. | ) | |

THE GOVERNMENT'S
MOTION FOR LEAVE TO INTERVENE

Pursuant to 31 U.S.C. § 3730(c)(3) and Rule 24(b) of the Federal Rules of Civil Procedure, the United States respectfully requests that the Court permit it to intervene in this qui tam action. As shown in the accompanying Memorandum In Support and Declaration of John A. Kolar, the United States has good cause for intervention at this time.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

HENRY L. SOLANO
United States Attorney

PAUL J. JOHNS
Assistant United States
Attorney

/s/ John A. Kolar
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Dated: November 13, 1995

[FILED]
[U.S. DISTRICT COURT
[DISTRICT OF COLORADO]
['95 NOV 14 A8:43]
[JAMES R. MANSPEAKER CLERK]

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

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|---|---|---|
| UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, Plaintiffs, | ) | |
| v. | ) | Case No. 89 C 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, Defendant. | ) | |

DECLARATION OF JOHN A. KOLAR

I, John A. Kolar, do hereby declare and state as follows:

1. I am a trial attorney with the United States Department of Justice ("DOJ"), Civil Division, Commercial Litigation Branch. My duties including handling cases under the False Claims Act, 31 U.S.C. §§ 3729, et seq., including qui tam False Claims Act suits filed pursuant to 31 U.S.C. § 3730. I have personal knowledge of the facts contained in this Declaration, which is made in support of the United States' Motion to Intervene in this case.

2. The relator, James Stone, filed this qui tam action against Rockwell International Corporation ("Rockwell") on

or about July 4, 1989. The Complaint alleges that Rockwell, which managed the Department of Energy's ("DOE") Rocky Flats nuclear weapons plant in Golden, Colorado, concealed and misrepresented its poor environmental, safety and health ("ES&H") performance to DOE in an effort to preserve its contract and earn millions of dollars in payments and fees, including award fees, which it would not have been awarded, had DOE known the truth. Mr. Stone's case was assigned to me shortly after it was filed.

3. On March 26, 1992, simultaneously with the filing of Rockwell's criminal guilty plea to environmental violations, we filed a notice declining to intervene in this action.

4. In August 1991, Rockwell filed Rockwell v. United States, Case No. 91-1362 (Ct. Fed. Cl.), a breach of contract suit against the Department of Energy ("DOE") in the United States Court of Federal Claims. In this suit, which is currently pending, Rockwell seeks approximately $6.5 million in award fees for the operation of Rocky Flats during the period from October 1, 1988 through September 30, 1989. Rockwell contends that DOE headquarters officials improperly lowered Rockwell's award fee below what the Contracting Officer would have awarded, due to Rockwell's poor performance in the Environment, Safety, and Health (ES&H) area. Rockwell contends that it should have received the higher award fee recommended by the Contracting Officer, because a provision of the Rocky Flats contract supposedly placed the award fee determination within the sole discretion of the Contracting Officer.

5. Pursuant to our defense of DOE in Rockwell v. United States, we conducted approximately 20 depositions of former Rockwell employees during April 1994. In December 1994, Rockwell produced 16 boxes of documents in our response to our discovery requests. In January 1995, Rockwell made another 80 boxes of documents available for inspection and copying.

6. In the course of the foregoing discovery, we developed evidence showing that Rockwell concealed and

misrepresented various environmental criminal law violations from the DOE. This evidence relates inter alia to "pondcrete". Pondcrete was a mixture of sludge from the "solar ponds" on the Rocky Flats site and cement. The pondcrete was supposed to take the form of solid blocks. The pondcrete blocks were stored on two asphalt parking lots on the Rocky Flats plant site known as the "750 Pad" and the "904 Pad".

7. In the criminal case, Rockwell had pleaded guilty to the illegal storage of pondcrete in violation of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. According to the Plea Agreement, a substantial number of pondcrete blocks were not in fact solid; rather, pondcrete was often a sludge-like or semi-liquid material. Also, according to the Plea Agreement, due to the insolid condition of the pondcrete, hazardous constituents leached out of the pondcrete and onto the 750 and 904 Pads.

8. As a result of discovery in Rockwell v. United States, we have developed evidence that Rockwell concealed the problems associated with pondcrete from DOE, and made misrepresentations to DOE with respect thereto. The evidence shows that Rockwell knew as early as May 1987 of the insolid condition of the pondcrete blocks, but Rockwell covered up and concealed this fact from DOE at least until May 1988. In May 1988, a box of pondcrete spilled on the 904 Pad, and the poor condition of the pondcrete became known to DOE. Subsequent to May 1988, however, Rockwell continued to falsely represent to DOE and others that it was ignorant about the insolid condition of the pondcrete prior to May 1988.

9. During the Fall of 1994, counsel for Mr. Stone contacted us and suggested that we should reconsider intervention in this suit. Mr. Stone's counsel took the position that the voluminous documents that had been produced during the course of document discovery had strengthened the relator's case, and warranted intervention by the government for good cause under 31 U.S.C.

§ 3730(c)(3). Mr. Stone's counsel organized those documents into submissions covering most of the major subject matter areas at issue along with narrative describing the significance of the evidence, and provided the submissions to us for our review.

10. As a result of the evidence obtained during discovery in the Rockwell Court of Federal Claims case and material submitted by Mr. Stone's counsel, we have concluded that we should intervene herein. We also plan to move for leave to amend the government's Answer in the Court of Federal Claims action to assert False Claims Act counterclaims parallel to the claims at issue herein, and a fraud defense pursuant to 28 U.S.C. § 2514. In addition, we are filing a motion to stay the Court of Federal Claims action, so that discovery can be completed and trial conducted in this suit.

11. If this Court permits us to intervene, we plan to add alternative common law legal theories to the complaint (common law fraud, unjust enrichment, payment by mistake, and breach of contract) which the relator does not have standing to bring on the government's behalf. However, these theories will be based upon the facts already in litigation. Thus, we do not anticipate that our intervention will alter the parameters of the facts under litigation in any significant respect. Moreover, we understand that depositions have only just commenced in this case. Based upon my discussions with relator's counsel, I intend to join in the deposition process currently underway, and I do not anticipate that our intervention will materially change or affect the pace of discovery.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 13th day of November 1995, at Washington, D.C.

/s/ John A. Kolar

John A. Kolar

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| v. | ) | |
| | ) | Case No. 89-C-1154 |
| ROCKWELL INTERNATIONAL CORPORATION, | ) | |
| Defendant. | ) | |

## SUPPLEMENTAL DECLARATION OF JOHN A. KOLAR

I, John A. Kolar, do hereby declare and state as follows:

A. Introduction

1. I am a trial attorney with the United States Department of Justice ("DOJ"), Civil Division, Commercial Litigation Branch ("DOJ-Civil"). My duties including handling cases under the False Claims Act, 31 U.S.C. §§ 3729, et seq., including qui tam False Claims Act suits filed pursuant to 31 U.S.C. § 3730. I have personal knowledge of the facts contained in this Declaration, which is made in support of the United States' Motion to Intervene in this case.

2. The relator, James Stone, filed this qui tam action (referred to hereinbelow as "the qui tam action" or simply "Stone") against Rockwell International Corporation ("Rockwell") on or about July 4, 1989. It alleges that Rockwell concealed from the Department of Energy ("DOE") and misrepresented to DOE its performance with respect to environmental, safety and health ("ES&H") matters while it was operating the Rocky Flats nuclear

weapons plant for DOE. This case was assigned to me shortly after it was filed.

B. History of the Civil Division's Dealings with the Prosecutors and Rockwell Regarding the Instant Qui Tam Action

3. In July 1989, when this suit was filed, Rockwell's ES&H performance at Rocky Flats was the subject of a federal grand jury investigation. We had difficulty investigating the qui tam case due to the pendency of the grand jury investigation. Much pertinent information was unavailable to us because it was subject to grand jury secrecy under Rule 6(e) of the Fed. R. Crim. P. As recited in a memorandum we submitted to the Court on March 5, 1990 seeking an extension of the qui tam investigative and seal period, and the Affidavit of Peter J. Murtha, one of the criminal prosecutors leading that investigation, in support thereof (Ex. D(4) to Rockwell's Opposition) by March 1990: (a) the criminal investigation had gathered approximately 1,000,000 million pages of documents; (b) the Civil Division had for many months been attempting to obtain access to documents in possession of the Rocky Flats criminal investigation, but was unable to; (c) many of the documents were subject to grand jury secrecy and were unavailable to the Civil Division; and (d) the criminal prosecutors did "not favor the release of the grand jury material to the Civil Division pursuant to court order under the provisions of Fed. R. Crim. P. 6(e)(3)(C)(i) at this time because it would burden our investigation substantially and could potentially undermine the secrecy of the grand jury during this critical pre-indictment period." (See Affidavit of Peter J. Murtha, ¶ 7, Ex. D(4) to Rockwell Opposition.)

4. Following the filing of this pleading, the prosecutors did permit us to review a very limited subset of the information they had gathered. This consisted of documentary evidence in the possession of the criminal investigation, other than documents subpoenaed by the grand jury. Contrary to the assertions in Rockwell's

response, prior to finally declining Stone in March 1992, we were never permitted access to documents that had been subpoenaed by the grand jury (even though such documents arguably constituted non-6(e) material under Tenth Circuit case law), nor did the prosecutors agree to permit us to file a motion for such access pursuant to Rule 6(e) (as discussed above). Moreover, the prosecutors even declined to share with us memoranda of interview prepared by the FBI and Environmental Protection Agency ("EPA") investigators assigned to the grand jury task force for fear that this might raise an argument by Rockwell that grand jury secrecy had been violated. The prosecutors were justifiably careful to preserve the integrity of the grand jury investigation. This position was consistent with DOJ's general practice of having the civil side defer to the criminal investigation, particularly where a grand jury investigation is underway.

5. During the Fall of 1990, I spent a couple of days in Denver reviewing and selecting for copying non-grand jury subpoenaed documents that had been made available by the prosecutors and that I believed might be relevant. We proceeded to review those documents. However, to be frank, we were not able to learn very much from those documents, inasmuch as we lacked a thorough understanding of the operations of the Rocky Flats Plant and other necessary contextual information at that point in time. After some initial efforts to investigate, we concluded at some point during the Fall of 1990 that the best course of action was to await the outcome of the grand jury investigation, rather than trying to "re-invent the wheel" by conducting our own full-tilt parallel investigation. We reached that conclusion for several reasons: (a) the grand jury investigation was massive and was requiring a great quantity of investigative resources; (b) utilizing Civil Division resources to duplicate the grand jury investigation would not have been cost-beneficial; and (c) the prosecutors expressed concerns to us that any duplicative investigation by DOJ-Civil might interfere with their ongoing efforts.

6. We hoped that this Court would grant us extensions of the qui tam investigative period commensurate with the duration of the grand jury investigation, but that turned out not to be the case. During the Fall of 1990, I appeared before the Honorable Jim R. Carrigan, District Judge, who was then presiding over the qui tam case, and was advised by Judge Carrigan that he would not grant further extensions beyond October. Judge Carrigan ultimately entered an order requiring that DOJ-Civil file its election whether to intervene in or decline this qui tam suit in November 1990. On or about November 8, 1990, we filed a Notice informing the Court that "[d]ue to the time and investigative constraints placed upon the Civil Division of the Department of Justice, the United States respectfully notifies the Court that it is unable at this time to make an election to intervene or not to do so in [this qui tam action]." (See Exhibit D(9) to Rockwell's Opposition.) Although we intended to proceed with the investigation in due course, for the reasons of prosecutive efficiency described in paragraph 5, as of the Fall of 1991, our investigation had not progressed significantly further. Again, it appeared to us to be more efficient to await the conclusion of the grand jury process before undertaking substantial new investigative efforts of our own.

7. During the Fall of 1991, Mr. Murtha and Kenneth R. Fimberg, the lead prosecutor for the United States Attorney's Office in Denver in the grand jury investigation, informed us that they were negotiating a plea agreement with Rockwell. They told us that one of the sticking points was Rockwell's desire for a "global release" from liability by the government that would include civil False Claims Act liability, including for the conduct alleged in Stone. Messrs. Fimberg and Murtha queried us as to our position regarding a civil release. We advised them we would confer and get back to them.

8. To aid us in our deliberations as to whether to civilly release Rockwell, we asked the prosecutors at

various times during the Fall of 1991 whether the non-grand jury evidence in their possession indicated that Rockwell had submitted false statements or claims to DOE. They told us that they could not share their investigative information with us for fear of violating Rule 6(e).

9. In approximately mid-October 1991, we advised the prosecutors that we were insufficiently knowledgeable about the facts and evidence to grant Rockwell a civil release. We had limited information and simply could not form a judgment as to whether Rockwell had violated the False Claims Act.

10. We understood from the prosecutors that they conveyed our position to Rockwell, and the evidence submitted by Rockwell with its response so indicates. For example, the October 18, 1981 letter from Rockwell's criminal defense counsel, Lee D. Foreman, acknowledges that "DOJ-Civil does not consider a meeting [with Rockwell] to be useful . . . ." (See Ex. B(9) to Rockwell's Opposition.)

11. In that letter, Mr. Foreman proposed the following language for insertion into the plea agreement:

> In connection with this disposition, the United States agrees that, as to all matters which relate to the subject matter of this Grand Jury investigation which are presently known to the Department of Justice or the Environmental Protection Agency, the United States covenants not to sue or take administrative action against Rockwell for civil damages, penalties, or, other monetary relief under . . . the False Claims Act, 31 U.S.C. §§ 3729 et seq.

(Ex. B(9).) As we understood it, by proposing this language, Rockwell hoped to preclude us in DOJ-Civil from pursuing civil False Claims Act claims based on any information in the hands of the prosecutors even if that information was not known to us. We rejected this language because pertinent information was then unknown to us, and we

believed it would have been irresponsible for us to release claims without full knowledge of the facts regarding Rockwell's conduct. We communicated our position both to the prosecutors and directly to Rockwell.

12. On or about October 31, 1991, my Deputy Director, Joyce R. Branda, had a telephone conversation with Gary Black, an Assistant Corporate Counsel with Rockwell involved in handling the Rocky Flats matter for Rockwell. Ms. Branda told Mr. Black that the language described in the preceding paragraph "was not on the table" because DOJ-Civil "could not release the unknown." Ms. Branda further advised Mr. Black that, while it was unlikely DOJ-Civil would elect to intervene in Stone, we could not give Rockwell any assurances that we would never do so.

13. Contrary to the contention by Rockwell that DOJ-Civil was fully informed about the investigation during the Fall of 1991, I note that Rockwell sought an agreement from the prosecutors, who refused to agree, that would have blocked DOJ-Civil's future access to Rule 6(e) materials. Provisions with that effect were included in Rockwell's October 15, 1991 letter to Michael Norton (Ex. B(8) to Rockwell's Opposition), and the draft plea agreement attached thereto.

14. Despite Ms. Branda's conversation with Mr. Black on October 31, 1991, Rockwell persisted in its efforts to obtain a civil release. We agreed to meet with Rockwell's counsel on November 5, 1991.

15. That meeting was held on November 5, 1991. DOJ-Civil was represented by Deputy Assistant Attorney General Stuart E. Schiffer, the Director of the Civil Fraud Section (my section) Michael F. Hertz, the Deputy Director, Joyce R. Branda, and the undersigned. United States Attorney Michael Norton, Ken Fimberg, and Peter Murtha were also in attendance. Rockwell's representatives included John Aldock, Lee Foreman, Bryan Morgan, and Gary Black, all counsel for Rockwell. During that meeting, Rockwell provided to us proposed language for the plea

agreement that would effectively have given it a civil release from liability from False Claims Act claims for environmental matters at Rocky Flats. (See Exhibit A hereto.)

16. We (DOJ-Civil) rejected that language and reiterated our position to Rockwell that we were insufficiently knowledgeable about the facts and evidence to give Rockwell a release from civil False Claims Act liability. In fact, we told Rockwell that we were insufficiently informed even to attempt to negotiate a settlement with them. We advised Rockwell that we had had access to only a limited quantity of non-grand jury subpoenaed documents, and, therefore, could not make an informed judgment on the merits. We certainly did not tell Rockwell's counsel that, "we felt well informed concerning the information developed during the criminal case," as asserted by Mr. Foreman in his affidavit. Indeed, I have a specific recollection that it was in response to our statement that we lacked access to grand jury information that Rockwell agreed to submit to us, by letter dated November 11, 1991 (Ex. C(1) to Rockwell's Opposition), documents that Rockwell asserted "provide[d] the factual basis for the subject areas covered by the criminal counts." In other words, Rockwell undertook to apprise us of the nature and scope of the prosecutors' evidence, because, as Rockwell recognized, the prosecutors could not share the fruits of their investigation with us.

17. Notwithstanding our refusal to grant Rockwell a release or to enter into settlement discussions with them, Rockwell wanted some degree of "comfort" that DOJ-Civil was not then harboring a present intention to proceed against them in the qui tam suit. As a middle ground between our position that we could not release Rockwell and Rockwell's desire for a release, it was agreed that we would re-examine the evidence in our files, together with any evidence Rockwell wished to provide to us, and formalize the position we had earlier taken (in filing our Notice with the Court on November 8, 1990) that we were not

proceeding with Stone at the time. From our perspective, this merely continued the status quo ante because, as a matter of fact, we were not in the Stone litigation at that point in time and we had no intention of joining the litigation at that point in time.

18. However, during the November 5 meeting, we advised Rockwell that, assuming we did file another Notice which formalized our non-intervention, we were not binding ourselves forever to not intervene in Stone. We called to Rockwell's attention 31 U.S.C. § 3730(c)(3), which permits the government to intervene later for "good cause" even after it has initially declined a qui tam suit. We told Rockwell that we had no intention of relinquishing our right to intervene later in Stone, if "good cause" should arise under 31 U.S.C. § 3730(c)(3). Rockwell advised us that they would submit to us what they felt was the most "inculpatory" evidence in the possession of the prosecutors, so that we would be fully informed about the prosecutors' case and Rockwell could attempt to challenge any future effort at intervention by us to the extent it was based upon the same evidence on the grounds that it did not meet the statutory standard. We have subsequently learned that the evidence Rockwell turned over to us was inculpatory with regard to Rockwell's commission of ES&H crimes, but that it either did not address at all or was exculpatory on the issue of whether Rockwell concealed those crimes from DOE, other otherwise misrepresented their conduct to DOE.

19. Rockwell clearly understood that they were not receiving a civil release or settlement. Attached to the Affidavit of Lee D. Foreman in support of Rockwell's Opposition is a November 8, 1991 letter that Mr. Foreman sent to AUSA Ken Fimberg (Ex. B(10)). Mr. Foreman sent this letter subsequent to meeting with us on November 5. Mr. Foreman stated in his letter that it was

> the clear position taken in Washington by DOJ-Civil . . . that they were not settling with us . . .

(emphasis added)

20. By letter dated November 11, 1991 (Ex. C(1) to Rockwell's Opposition), Rockwell submitted the "inculpatory" evidence for our review. We reviewed that evidence, along with the limited evidence we had previously gathered, and recommended that a Notice formally declining Stone be filed.

21. Authority to file that Notice was granted in November 1991, but we were asked to wait to file our Notice with the Court until the criminal plea was actually entered. Accordingly, we waited until March 26, 1992 to file. We did not conduct any further investigation in the interim.

22. On March 26, 1992, we sent Rockwell a letter, a copy of which is attached hereto as Exhibit B, informing Rockwell of our decision. The letter describes in broad terms the non-grand jury evidence we had reviewed in reaching our decision. We stated in the letter that this evidence had included "non grand-jury [sic] evidence acquired during the criminal investigation." This was a reference to the documents that I had copied from the prosecutors' files of non-grand jury subpoenaed documents during the Fall of 1990 and, for the most part, those documents related to the award fee process, as indicated by the second paragraph of the letter.

23. Notably, our March 26, 1992 letter to Rockwell expressly informed Rockwell that we were preserving our right to intervene later in Stone under the statutory standard of "good cause". The last paragraph stated:

> Based upon our review of this evidence, we have filed a Notice Declining To Intervene In This Action. As indicated in that Notice, and as provided by 31 U.S.C. § 3730(c)(3), the United States reserves the right to intervene in the action upon a showing of "good cause".

24. On March 26, 1992, simultaneously with the filing of Rockwell's criminal plea, we filed a notice declining Stone.

Our notice declining intervention expressly stated: "The United States also reserves its rights under 31 U.S.C. § 3730(c)(3) to intervene at a later date upon a showing of good cause." (Ex. B(15) to Rockwell's Opposition.) At no time did we (or any other government officials, to our knowledge) suggest to Rockwell that the "good cause" standard that would apply in this case would be or should be any different than the standard established in the statute.

24a. At the time the prosecutors filed the Plea Agreement, we understand that they also filed a Sentencing Memorandum. Consistent with their position that they could not disclose evidence from the criminal investigation to us, the prosecutors did not provide drafts of the Sentencing Memorandum in advance of the filing of the plea, and we did not see the Sentencing Memorandum or drafts thereof prior to December 1992 (see below).

25. The final Plea Agreement (Ex. B(14) to Rockwell's Opposition) is clear that there were no "side bar" promises regarding the "good cause" standard. The release language therein stated:

> This covenant does not encompass (or preclude) . . . the issues raised in United States ex rel., and James S. Stone v. Rockwell International Corporation, Civil Action No. 89-C-1154 (D. Colo.). (¶ 5.)

It stated no more than that:

> After an independent review, the Department of Justice--Civil Division has determined to file a notice in Stone declining to intervene. (¶ 5.)

The Plea Agreement further stated:

> This document states the parties' entire agreement. There are no other agreements, terms or conditions, express or implied. In entering into this agreement, neither the Department of Justice nor Rockwell have relied, or are relying, on any terms, promises or

conditions not expressly stated herein. (¶ 12.)

26. In light of our clear course of dealing with Rockwell with respect to the question of civil liability and later intervention for "good cause" in Stone, described above, and the statement in the Plea Agreement that there were no "side bar" promises, it would have been manifestly unreasonable for Rockwell to believe that the criminal prosecutors were placing any kind of "gloss" on the "good cause" standard, as Rockwell appears to suggest in its response.

27. To the extent that Rockwell believes it paid a larger criminal fine after we agreed to file a Notice of Declination in Stone than it would have paid in the absence of that Notice (and we were not privy to the alleged discussions between Mr. Fimberg and Rockwell's counsel in this regard), Rockwell got what it asked for. We did in fact file the Notice on March 26, 1992. At that time, we in DOJ-Civil were not harboring any intention to later intervene in Stone, but, as Rockwell well knew (because we told them during the November 5, 1991 meeting, in our letter of March 26, 1992, and in our Notice of Declination), we had expressly reserved our right to do so, if "good cause" were later to arise.

28. Thus, the sole issue before the Court is whether DOJ-Civil can demonstrate "good cause" for intervention now under the standard set forth in 31 U.S.C. § 3730(c)(3).

C. The Principal Reasons for our Declination.

29. We declined this case because, at the time we were making our decision, that is, during the Fall of 1991, we were unable to ascertain that Mr. Stone had a viable False Claims Act case. Our principal concerns were as follows. First, the complaint filed by Mr. Stone was broad and all-encompassing and contained little or no specification of the statements that he believed were false or fraudulent. While we obviously were aware that Rockwell intended to plead guilty to ES&H violations, nowhere in the Plea Agreement

drafts that were provided to us in the Fall of 1991 was there any indication that Rockwell had made misrepresentations to DOE, or concealed its conduct from DOE, or otherwise committed fraud or submitted false statements to DOE in regard to ES&H performance. (A second document denominated "Plea Agreement and Statement of Factual Basis" was filed at the time of the entry of the plea, but this document was not shared by the prosecutors with us prior to our declination.)

30. Moreover, the material provided to us by Rockwell in November 1991 was designed to further inform us about the "factual basis for the subject areas covered by the criminal counts." Rockwell's submission did not address whether Rockwell had made false statements or had concealed material information from DOE. Indeed, Rockwell's description of the material it was submitting to us with regard to pondcrete (which was not then, but which later became, the primary focus of our concern) stated:

> Documents and witness statements [prepared by Rockwell] relating to pondcrete matter are collected in Tab D. The essential facts alleged by the prosecution are that pondcrete was poorly manufactured, deteriorated in outdoor storage causing leachate to run off the storage pads, and was stored without the necessary RCRA permits.

(See Ex. C(1) to Rockwell's Opposition, p. 2) We concluded that "such essential facts" would not in and of themselves support liability under the False Claims Act.

31. We were aware that Rockwell had represented to DOE in its so-called "Self-Analyses" submitted during the award fee process that it was complying with the ES&H laws. We thought it possible that such statements might have constituted misrepresentations in light of the fact that Rockwell was pleading guilty to violations of those laws. However, we did not see any nexus between specific aspects of Rockwell's violations and those statements. Additionally, we had a question about whether DOE relied upon those

statements in deciding Rockwell's award fees.

32. For these principal reasons, we reached our decision to decline in November 1991, and, as already noted, filed our Notice on March 26, 1992.

D. The Development of Additional Evidence after March 1992 and Its Significance.

33. In approximately December 1992, Mr. Stone's counsel sent a copy of the Plaintiff's Sentencing Memorandum to my former colleague, Allen Bruns. Mr. Bruns, then an attorney in DOJ-Civil's Court of Federal Claims Section (Mr. Bruns passed away later in December 1992), was handling the government's defense of Rockwell's suit for award fees, Rockwell v. United States, in the Court of Federal Claims. Rockwell alleges in that suit that DOE officials at headquarters in Washington, D.C. breached the Rocky Flats contract by lowering Rockwell's award fees after the FBI raid in June 1989, because the contract required that the award fee be the determination of the contracting officer, the Manager of DOE's Albuquerque, New Mexico operations office.

34. After Mr. Brun's death, Rockwell v. United States was assigned to me.

35. In December 1992, I reviewed the Plaintiff's Sentencing Memorandum. To my knowledge, this was the first time anyone in DOJ-Civil had seen the Sentencing Memorandum or was aware of the allegations contained therein.

36. The allegations in the Plaintiff's Sentencing Memorandum went far beyond the conduct to which Rockwell had pleaded guilty in its March 1992 plea. The Sentencing Memorandum argued that Rockwell had engaged in a pattern and course of conduct of concealing and misrepresenting information about its performance with respect to "pondcrete", and other environmental compliance issues, from DOE. Upon reading the Sentencing Memorandum in December 1992, I realized that there might

be merit to the allegations in Stone after all. I also recognized that any fraud or false statements in connection with pondcrete (or other ES&H matters) might provide the government a defense to Rockwell's action for award fees. See, e.g., 28 U.S.C. § 2514 (the Special Plea in Fraud).

37. Accordingly, at that time, I determined to embark upon additional investigation to determine whether in fact the allegations made by the prosecutors in the Sentencing Memorandum had merit. In approximately January 1993, I advised Richard J. Ney, Rockwell's counsel in Rockwell v. United States, of my intention in this regard, and told Mr. Ney that such information might provide the government with defenses to Rockwell's suit. I also advised Mr. Ney that, if the allegations in the Sentencing Memorandum were borne out, I might consider recommending intervention in Stone for good cause.

38. In March 1993, I served discovery upon Rockwell in Rockwell v. United States that was intended to elicit information regarding any misrepresentations and concealments in regard to pondcrete and a couple of other areas. I decided to focus most of my efforts upon pondcrete because it seemed from my reading of the Sentencing Memorandum that it was the most manageable single area.

39. Over the course of the next three years, we gathered evidence that we believe furnishes good cause under 31 U.S.C. § 3730(c)(3) for intervention. Our efforts to gather that evidence included the discovery requests we served on Rockwell in March 1993 in Rockwell v. United States, and depositions we conducted of former Rockwell employees in April 1994 in that lawsuit. We also obtained non-6(e) criminal investigative memoranda which the criminal prosecutors had declined to share with us prior to our declination decision. Rockwell resisted our document requests, and it was not until December 1994 and January 1995 that Rockwell produced responsive documents in compliance with an order of the Court of Federal Claims.

40. I also note that, prior to taking depositions in April

1994, we sought an order under Rule 6(e) from this Court (by Finesilver, former C.J.) allowing us access to grand jury subpoenaed documents in the hands of the criminal prosecutors. Rockwell successfully opposed our motion on the ground that we had not exhausted all avenues for obtaining those documents in the Court of Federal Claims suit (even though our requests for the documents had been pending since March 1993).

41. Thus, at every stage, Rockwell has resisted our efforts to discover the facts about its concealment and misrepresentations with respect to its ES&H performance, and it has therefore required three years for us to reach the stage where we believed we had sufficient information to assert False Claims Act claims against Rockwell through intervention in Stone.

42. I will attempt to describe some of the evidence which we obtained post-March 1992 showing that Rockwell engaged in a course of conduct to conceal and misrepresent its performance with respect to pondcrete from DOE and thereby obtain increased award fees. All of the evidence and documents I describe below we obtained for the first time subsequent to March 1992 (and, indeed, subsequent to June 1992, when the criminal court accepted Rockwell's guilty plea).

43. In his EPA interview (Ex. C(19 to Rockwell's Opposition), Howard Long, a Rockwell pondcrete operator, made the following highly inculpatory admissions regarding Rockwell's knowledge of the insolidity of pondcrete prior to May 23, 1988 (Rockwell has alleged that May 23, 1988 was the first time it became aware that any significant number of pondcrete blocks in storage on the 750 and 904 Pads on the Rocky Flats Plant site was "mushy", rather than solid, as DOE believed it to be). Mr. Long stated (this and the other summaries below are not in every case verbatim quotations from the interview memoranda; in some instances, I have edited the information in those memos or otherwise condensed it, while attempting not to alter its

substance):

> All Rockwell employees realized that there was a problem with the mixing of Pondcrete as many of the blocks were not setting correctly.
>
> In 1987, there was a push for massive production of Pondcrete because there was a deadline for closure of the 207A Pad imposed upon Rocky Flats by the Colorado Department of Health. During that time period, production of Pondcrete was up to about 120 boxes a day, but the rejection rate was high. After the first few rejections by the Union inspectors, Ron Teel instructed the employees to 'doctor up' the bad blocks. This was accomplished by sprinkling cement onto the top of the bad blocks. This caused the first few inches of the bad blocks to harden, so that the inspectors would believe that the whole block had set satisfactorily. These boxes were also sent to the 750 Pad for storage.
>
> Long had complained to Teel approximately 100 times during the year about the deteriorating boxes of Pondcrete both during production at Building 788 and while they were sitting on the 750 Pad. Long was also present when Dean Pierson, Dick Garrett, Ralph Sprague and Pat McNeil complained to Teel on numerous occasions about the deterioration of the Pondcrete containers.
>
> In August and September of 1987, the Pondcrete crew observed that many boxes of Pondcrete on the 750 Pad were leaking badly. They reported this to Dan Tallman, the Pondcrete Operation foreman. Tallman instructed them to shut down the operation, and leave the boxes alone.
>
> In December 1987, Long, Pierson, and Swenson complained to William Weston, Rockwell's

> Director of Plutonium Operations, about the leaking pondcrete. Nothing happened as a result of that meeting.

44. Mr. Long's information is also significant because it confirms that the pondcrete insolidity problem was the direct result of Rockwell's effort to increase pondcrete production levels. We contend that Rockwell made that decision to create a misleading impression to DOE that it was meeting the RCRA compliance schedules when, in fact, all Rockwell was doing was removing hazardous sludge and converting it into pondcrete blocks that Rockwell knew would later have to be remediated. We contend that DOE would not have paid Rockwell as much as it did in award fees if DOE had known that Rockwell was knowingly engaging in what amounted to a "shell game" with the sludge, which merely gave a superficial impression that it was complying with the RCRA compliance agreement.

45. In her EPA interview (Ex. C(23)), another pondcrete operator, Patricia McNeil, stated:

> The pondcrete was supposed to be a solid concrete block that was solid from top to bottom. It was okay for the pondcrete to leave Building 788 (where it was mixed) with a putty like consistency but the pondcrete would set up and become a solid block after it was put in storage (on the Pads).
>
> However, when McNeil went out to the 750 Pad, she and the other workers would walk on top of the pondcrete blocks to put the tarps on them. From walking on the blocks you could feel that some of them were soft. It was common knowledge that some of the pondcrete blocks were soft at the 750 Pad. McNeil believes that part of the problem was when Rockwell "jacked up" production to 200 boxes per week it cut into the quality of the pondcrete.

46. Ms. McNeil's statement is significant because it

belies Rockwell's continued assertions to us (as recently as September 1995) that there was no requirement that the pondcrete blocks be solid monoliths; rather, Rockwell has consistently argued to us that it was sufficient that the blocks be of a putty-like consistency both before they left the processing building and while they were stored on the Pads. Additionally, Ms. McNeil's statement further corroborates Mr. Long's statement that the degradation in pondcrete quality was due to Rockwell's decision to speed up production.

47. Pondcrete operator Richard Garrett (Ex. C(28)), told the EPA that:

> Sometime in the winter of 1987/88 a box of pondcrete was dropped off a truck by Leif Swensen. Garrett was present. The material spilled onto the 904 Pad and was cleaned up by Garrett and Swensen. Garrett said he informed [his supervisor] Ron Teel of this incident, which Garrett believed predated the May 23, 1988 spill.
>
> It was obvious to Garrett from his trips to the 904 Pad that there was a problem with the pondcrete. He said the problem was obvious for many months before the May 23, 1988 spill.

48. Both Long and Garrett stated that they complained to their supervisor, Ron Teel, about the pondcrete problems described in their interviews. Long indicated that he complained to Teel "approximately 100 times" during 1987. McNeil stated that the insolidity of pondcrete was common knowledge among Rockwell employees. Yet, Rockwell has continuously denied that this information from its pondcrete operators flowed up the company's chain of command.

49. In a request for admission ("RFA") which we served upon Rockwell in March 1993 in Rockwell v. United States, we asked Rockwell to admit:

> . . . by the Spring of 1987, several Rockwell employees involved in making pondcrete told their

> foreman [i.e., Ron Teel] that a significant portion of the pondcrete blocks were not solidifying and were unstable.

Rockwell responded to this RFA as follows:

> Rockwell denies this RFA. The deposition testimony of the foreman responsible for pondcrete production during the Spring of 1987 [Ron Teel] indicates that pondcrete workers did not report to him that significant numbers of pondcrete blocks did not solidify . . . .

50. Another indication that the information flowed up Rockwell's chain of command was the EPA interview of Richard Roundtree, Ex. C(29) to Rockwell's response. Roundtree was one of the pondcrete inspectors. Roundtree stated:

> He knew there was a problem with pondcrete not setting up [hardening]. He and the other inspectors knew this and the information was passed along to their supervisor, who Roundtree believed passed the information to the next level of supervision.

51. One of the issues in this case is whether or not DOE officials relied upon the concealment of ES&H information by Rockwell. Our new evidence includes evidence that DOE did so rely. The following memoranda of interview of DOE officials indicate reliance by DOE officials.

52. The EPA interviewed Candice Jieree, Chief of the DOE Safety and Environment Branch at Rocky Flats (see copy of interview appended hereto as Exhibit C). Ms. Jieree stated:

> In the fall of 1987, we went on an inspection tour of the 904 pad, 750 pad, and Building 788 with Ed Naimon and Garvin Hewitt of Rockwell. Naimon and Hewitt did not inform her of any problems with making the pondcrete.
>
> It was not until the May 23, 1988 spill of pondcrete

> that Jieree became aware of the problem with contamination of the surface water with run-off from the 904 and 750 pads. The contamination of the run-off area around the pondcrete pads was the biggest potential environmental problem at the Rocky Flats Plant.
>
> She was not aware until interviewed by EPA [August 1, 1990] that, going back as far as October 1986, Rockwell had results indicating elevated contaminants in the run-off water from the pads.

53. The EPA interviewed Tod Anderson. Anderson was a DOE official at the Rocky Flats Plant. In August 1987, Jieree asked him to undertake an inspection of the 750 Pad. He did so, and found that the cardboard boxes holding the pondcrete was deteriorating. Anderson had Rockwell personnel open two of the boxes. The pondcrete inside appeared to be solid, as Anderson understood it was supposed to be. Anderson noticed some leaning boxes, but believed the leaning was due to the void space in the tops of the boxes between the upper surface of the pondcrete blocks and the cardboard itself. At this time, there was no question in Anderson's mind that the pondcrete was solid. (See copy of interview attached hereto as Exhibit D.)

54. The EPA interviewed Frank Bingham, who in 1987-88 was the Chief of the Environmental Compliance Branch, DOE, at the Nevada Test Site ("NTS") (Ex. C(24) to Rockwell's Opposition). The pondcrete blocks were intended for ultimate burial at the NTS. Mr. Bingham told the EPA investigators that

> He toured the Rocky Flats Plant including the manufacturing building for pondcrete prior to the May 23, 1988 spill. He was assured and came away with the impression that NTS was receiving a solid concrete block. The first time he learned there was a problem with solidification was upon notification, after the May 23, 1988 spill by Rockwell and DOE's Rocky Flats Office.

> Bingham was upset because NTS had told the State of Nevada that the materials being buried at NTS were free of liquids. Based on these representations, NTS was allowed to bury these materials without having a leachate collection system of liner.

55. Bruce Fitzsimmons was another DOE official at NTS. Mr. Fitzsimmons told the EPA investigators that Bruce Church, the head of NTS, was very upset upon finding that the pondcrete was not solid.

56. Whether DOE knew about the pondcrete problems prior to the May 23, 1988 spill is an important factual issue in this qui tam litigation. Rockwell has asserted throughout its litigation against Mr. Stone, and in its litigation against the government in the Court of Federal Claims that DOE officials were well aware of the pondcrete solidification problems prior to May 1988.

57. Ironically, at page 16 of its Opposition, Rockwell argues that evidence of DOE's ignorance was available to us prior to our filing of the declination notice in March 1992, and therefore cannot be "new" evidence that justifies intervention for good cause. The fact is that the interviews of DOE employees cited above were not made available to DOJ-Civil prior to declination. DOJ-Civil obtained those interviews subsequent to declination, and then confirmed that DOE was unaware of the problems by the absence of any substantial information suggesting DOE knowledge in the more than 100 boxes of documents we reviewed in December 1994 and January 1995. Yet, as recently as September 1995, Rockwell continued to maintain that intervention herein was not justified on the merits, **precisely because DOE knew about the problems.** Rockwell cannot have it both ways. Rockwell cannot argue to us that intervention is inappropriate on the merits because DOE knew of the problems, and still argue to this Court that our evidence of DOE's ignorance is "old", rather than "new", evidence.

58. Another issue on which we lacked evidence when we declined the case in March 1992 was whether or not Rockwell's plant management knew about the pondcrete problems. Rockwell management knowledge is an especially significant issue in this case due to Rockwell's contention that its contract with DOE immunizes it from liability unless its then Plant Manager, Dominic Sanchini (who is deceased), personally acted with "wilful misconduct or lack of good faith" in regard to pondcrete. While we disagree with Rockwell's position regarding the contract, this is obviously an issue with which we must deal. As already indicated, Rockwell has steadfastly denied that information about insolid pondcrete flowed up its command chain.

59. At the time we declined, Rockwell had submitted to us a one-page handwritten note from an individual identified only as "Wayne" which alluded to a meeting involving Mr. Sanchini on or about September 9, 1987 (Ex. C(4) to Rockwell's response) indicating that "Dom" was "looking for ideas" "to really make a solid block" such as "mix[ing] more concrete" into the blocks. Rockwell did not submit to us any clarifying information regarding this isolated one-page note, or identify "Wayne" or inform us of his high rank within Rockwell's management chain.

60. We first ascertained the identity of "Wayne" during our deposition of former Rockwell employee Frank Blaha on April 20, 1994 (thus, more than two years subsequent to our declination). Mr. Blaha identified "Wayne" as Wayne Meyers and described him as Rockwell's Director of Health, Safety and Environment.

61. The day following the Blaha deposition, April 21, 1994, I, along with DOE Special Agent Kathryn R. Kemper, interviewed Mr. Meyers. We took a sworn statement from Mr. Myers authenticating the handwritten note mentioning "Dom" and confirming that "Dom" was in fact Mr. Sanchini, Rockwell's Plant Manager. (See Exhibit E hereto.) Mr. Meyers clarified that, at the time he prepared the

document, he was Rockwell's Director of Safety, Safeguards, and Security, a position in which he directly reported to Mr. Sanchini and oversaw Rockwell's environmental division.

62. During our depositions in April 1994, we obtained further confirmation of Rockwell's management's knowledge of the pondcrete problems prior to May 23, 1988. On April 22, 1994, I deposed Gary Potter. In the Fall of 1987, Mr. Potter was a Rockwell mid-level manager holding the title of Manager of Health, Safety & Environmental Operations Management. Mr. Potter testified that, in September 1987,

> [w]e had evidence that there were elevated levels of contamination on the 750 Pad. We also had evidence that the pondcrete blocks were not solidifying in the form that they were originally envisioned to be solidified. We had numerous meetings--when I say we, myself, and what would have been George Setlock and his subordinates, met with Ed Naimon [Rockwell's Manager of Waste Operations, who was overseeing pondcrete production] . . . to discuss this.

(See Exhibit F hereto.) Most significantly, however, Mr. Potter testified that this information about pondcrete not solidifying and the leaching of hazardous constituents from the blocks was conveyed to Mr. Sanchini and his general staff, consisting of his division Directors, and was a topic of concern to them in that time period (Fall 1987).

63. I note that one of the documents attached to Rockwell's response (Ex. C(11)), which as best I have been able to ascertain was not in our possession when we filed our Notice in March 1992, is a document entitled "Implementation Plan for Environmental Survey Findings Revision 1.0," dated February 2, 1988. This document was signed by G.W. Meyers and George Campbell, among others. This document (at p. 2.5.14) contains the statement that "To date, no confirmed leaching of hazardous

constituents out of the pondcrete has been identified." Taking into account Mr. Potter's testimony in April 1994 that Sanchini's general staff (of which Messrs. Meyers and Campbell were members) was concerned about leaching during the Fall of 1987 and held meetings to discuss the problem, coupled with the note referenced above from Meyers to George Campbell discussing Sanchini's concerns about pondcrete (the latter we admittedly did have in March 1992), the statement in the Implementation Plan appears to have been a knowing false statement by Messrs Meyers and Campbell.

64. Still more information regarding Mr. Sanchini's level of knowledge was obtained by us when Rockwell produced documents in December 1994. Attached to this Declaration as Exhibit G are handwritten documents showing that, during the Fall of 1987, Mr. Sanchini's subordinates, including Mr. Naimon, proposed as using plywood boxes as an alternative to the weaker tri-wall cardboard containers to hold the pondcrete blocks, but that Mr. Sanchini rejected this suggestion. This information, which we did not have when we declined in March 1992, coupled with the other newly obtained information confirming that Mr. Sanchini knew of the insolid condition of the pondcrete during the Fall of 1987, and, therefore, puts to rest any contention by Rockwell that our evidence fails to establish liability in light of the contractual provision mentioned above (even assuming, arguendo, that Rockwell is correct on the contract interpretation issue, which we deny).

65. I have reviewed the documents attached to Rockwell's response, which Rockwell alleges were available to DOJ-Civil at the time we filed our Notice of Declination on March 26, 1992.

66. The vast majority of those documents were not in our possession, and were not otherwise known to us, when we declined the case on March 26, 1992, and, therefore, constitute new evidence justifying intervention. They were

not supplied to us by the criminal prosecutors or by Rockwell prior to our decision to decline. The following documents attached to Rockwell's response were first obtained by us at various times subsequent to our filing of the Notice of Declination (and, indeed, subsequent to June 1, 1992, when the criminal court accepted Rockwell's guilty plea):

(a) 3/4/92 draft of the Plaintiff's Sentencing Memorandum (Exhibit 5 to the Affidavit of Bryan Morgan).

(b) Final version of the Plaintiff's Sentencing Memorandum (Exhibit 6 to Morgan Affidavit).

(c) Plaintiff's Supplemental Sentencing Memorandum (Exhibit 7 to Morgan Affidavit).

(d) Waste Rejection Reports stating that Rockwell had detected "leaking" pondcrete boxes on the Pads (Exhibit 10 to Morgan Affidavit).

(e) Implementation Plan For Environmental Survey Findings Revision 1.0 (Exhibit 11 to Morgan Affidavit).

(f) Weekly Inspection Logs showing that Rockwell was detecting "leakers" on the Pads on a consistent basis from July through November 1987 (Exhibit 15 to Morgan Affidavit).

(g) The Environmental Protection Agency ("EPA") report of the interview of Rockwell employee Howard Long (Exhibit 19 to Morgan Affidavit).

(h) FBI interview memorandum of Howard Long (Exhibit 20 to Morgan Affidavit).

(i) EPA interview report of Rockwell employee Ronald Teel (Exhibit 21 to Morgan Affidavit).

(j) EPA interview of Rockwell employee Daniel Tallman (Exhibit 22 to Morgan Affidavit).

(k) EPA interview of Rockwell employee Patricia D. McNeil (Exhibit 23 to Morgan Affidavit).

(l) EPA interview of Department of Energy employee ("DOE") Frank E. Bingham (Exhibit 24 to Morgan Affidavit).

(m) EPA interview of DOE employee Peter K. Fitzsimmons (Exhibit 25 to Morgan Affidavit).

(n) EPA interview of DOE employee Layton J. O'Neill (Exhibit 26 to Morgan Affidavit).

(o) EPA interview of Rockwell employee Allen Shubert (Exhibit 27 to Morgan Affidavit).

(p) EPA interview of Rockwell employee Richard Kyron Garrett (Exhibit 28 to Morgan Affidavit).

(q)-(kk) EPA or FBI interviews of Fred Brooks (Rockwell), Jack Giron (Rockwell), Gilbert Guterrez (Rockwell), Darryl Hornbacher (Rockwell), Stephen L. Kaiser (Rockwell), Delores Marie Krieg (Rockwell), Joseph Krupar (DOE), Wanda Elaine Lewis (Rockwell), John Leroy Lucy (Rockwell), Harber. A. McClearen (Rockwell), William C. Rask (DOE), Ronald Dean Reed (DOE), Paul Robledo (Rockwell), Ronald Roundtree (Rockwell), Hans W. Sattler (Rockwell), Robert D. Shankland (EPA), Mark Van Der Puy (Rockwell), Timothy Kim Freedman (Rockwell), John Robert Boland (DOE), Candice Jieree (DOE), and Eugene W. Kendall (Reynolds Electrical and Engineering Co.) (Exhibit 29 to Morgan Affidavit).

67. Of the material submitted by Rockwell in its response to the instant motion, the following documents were available to DOJ-Civil at the time of declination:

(a) 9/28/87 memorandum from F.J. Blaha to G.L. Potter (Exhibit 2 to Morgan Affidavit).

(b) Handwritten notes (Exhibit 3 to Morgan Affidavit).

(c) Handwritten note from "Wayne" to George Campbell, dated 9/9/87 (Exhibit 4 to Morgan Affidavit).

(d) Handwritten note dated 1/5/88 entitled "Top Priority Pad Inspection" (Exhibit 8 to Morgan Affidavit).

(e) 10/8/87 memo from G.L. Potter to E.R. Naimon and attachments (Exhibit 9 to Morgan Affidavit).

In its November 11, 1991 submission, in addition to the foregoing five documents, Rockwell provided other material to us including its own memoranda of interview of approximately 27 Rockwell employees, and other documents pertinent to the ES&H violations to which it planned to plead guilty. While Rockwell supplied us with its interviews of some of the individuals whom the criminal investigators interviewed, it was only after we received the government's interviews (post-declination) that we learned the full extent of those witnesses' knowledge.

D. Correction of Other Erroneous Statements by Rockwell.

68. Finally, I wish to correct some of the other erroneous statements made by Rockwell in its response. For example, on page 14 of its memorandum, Rockwell asserts that "DOJ" had 14 boxes of grand jury subpoenaed documents for "30 months before filing its Declination Notice." Since this statement comes in a section of Rockwell's memorandum where it is arguing that DOJ-Civil has new information warranting intervention, the impression given is that DOJ-Civil had access to the grand jury subpoenaed documents. That is not so. As already indicated, DOJ-Civil did not have any grand jury subpoenaed documents prior to its declination decision. Indeed, when we moved to obtain such documents in March

1994, Rockwell opposed our motion and the Court denied us access. (See Rockwell's memorandum in support, at 12, note 5.) We did not obtain these documents until Rockwell finally acceded in producing them to us in January 1995.

69. Moreover, during the plea negotiations between the prosecutors and Rockwell during the Fall of 1991, Rockwell attempted to obtain an agreement blocking any future access to grand jury information by all third parties, which would have included DOJ-Civil, after the completion of the grand jury investigation, and the government rebuffed Rockwell's effort. Obviously, since Rockwell was attempting to block our future access to such information, Rockwell knew that, when we considering declining, we lacked access to it.

70. Rockwell does the same thing in reference to interview memoranda prepared by criminal investigators. It asserts at page 14 of its memoranda that "DOJ" had interviews of 13 Rockwell employees (whom we later deposed) when, we declined in March 1992. As already stated above, we in DOJ-Civil did not have those interviews until dates subsequent to June 1992.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20th day of December 1995, at Washington, D.C.

/s/ John A. Kolar
John A. Kolar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE,

Plaintiff,

v.

ROCKWELL INTERNATIONAL CORPORATION,

Defendant.

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MEMORANDUM OPINION AND ORDER

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MATSCH, Chief Judge

On November 14, 1995 the United States moved to intervene in this *qui tam* action pursuant to 31 U.S.C. §3730(c)(3) and Rule 24(b) of the Federal Rules of Civil Procedure. This case was initiated by a complaint filed by James S. Stone, as relator, on July 5, 1989. The first claim for relief alleges that Rockwell International Corporation ("Rockwell"), as contractor operating the Department of Energy ("DOE") facility at Rocky Flats Nuclear Weapons Plant ("Rocky Flats"), committed wrongful acts and submitted false claims for reimbursement of costs and applications for fee awards under the contract in violation of the False Claims Act, 31 U.S.C. §3729. Mr. Stone contends that Rockwell knowingly and fraudulently caused the United States to receive less property or property of a diminished value and utility than that to which it was contractually entitled and that Rockwell concealed

violations of federal and state environmental and safety laws which, if known, would have adversely affected the payments it obtained through DOE. The complaint remained under seal until November 13, 1990, pursuant to orders extending the statutory time for the Department of Justice - Civil Division ("DOJ-Civ") to determine whether it would intervene and take over this action.

The Criminal Division of the Department of Justice, including the United States Attorney in this district, acting with other agencies, began investigating allegations of environmental crimes at Rocky Flats in 1988. In June 1989, agents of the Federal Bureau of Investigation and other federal law enforcement officers conducted an extensive search at Rocky Flats and other facilities of Rockwell and DOE under the authority of a federal search warrant. Documents were seized from Rockwell and from DOE. In August 1989, a special grand jury was empaneled for the specific purpose of investigating operations at Rocky Flats. The prosecutors conducting that investigation reported that approximately three and a half million pages of documents were reviewed; more than 800 witnesses were interviewed and that approximately 110 witnesses, including senior DOE officials and Rockwell blue collar workers, testified before the special grand jury.

The end result of the criminal investigation was a carefully negotiated plea agreement under which Rockwell waived indictment and pleaded guilty to an information charging ten environmental crimes on March 26, 1992. Rockwell paid stipulated fines totaling $18.5 million on June 1, 1992 when Judge Finesilver accepted the plea agreement under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

The government agreed not to bring other criminal environmental and related charges against Rockwell or its officers, directors or employees. Additionally, the United States agreed not to pursue civil or administrative actions against Rockwell for violations of the Resource

Conservation & Recovery Act, the Clean Water Act, the Clean Air Act, the Toxic Substances Act, or the Comprehensive Environmental Response, Compensation, and Liability Act. Although DOJ-Civ filed a notice that it declined to intervene in this case on the same day the Plea Agreement was filed, and although non-intervention was discussed during the plea negotiations, the Plea Agreement explicitly excluded the issues in this case from the government's covenant not to sue.

Other litigation between the government and Rockwell was pending during the plea negotiations. On August 15, 1991 Rockwell sued the United States in the Court of Federal Claims for breach of the contract between Rockwell and the DOE governing the operation of Rocky Flats. *Rockwell v. United States*, Case No. 91-1362. Rockwell alleged that DOE headquarters impermissibly caused DOE field officers to reduce Rockwell's award fees to an amount $6.5 million below what it should have received. That case was also discussed during the plea negotiations when Rockwell unsuccessfully attempted to reach a "global settlement." On November 3, 1995 the United States filed a motion for leave to file an amended answer asserting counterclaims under the False Claims Act and forfeiture of Rockwell's claims because of fraud as provided in 28 U.S.C. §2514. On July 17, 1996 Judge Yock granted that motion, determining that Rockwell would not be unfairly disadvantaged or prejudiced because it had notice that the government was considering filing such a motion as early as 1992 and because Rockwell contributed to discovery disputes delaying development of the Federal Claims Court case.

Counsel for the government say that the motion to intervene in this case results from information obtained through discovery in *Rockwell v. United States* and from additional information developed by counsel for Mr. Stone in this action. They contend that they now have evidence, which they did not previously have, that Rockwell

intentionally concealed and misrepresented its environmental and safety performance in the submissions to DOE for contract payments. On December 21, 1995 Mr. Stone filed a pleading in support of the government's motion for leave to intervene. Rockwell filed its opposition to the government's motion on December 14, 1995, arguing that the motion violated the Plea Agreement and that the government has failed to demonstrate "good cause" for intervening more than three years after filing its notice declining to intervene.

This court has ruled, in a separate memorandum opinion and order in the criminal case, that the government's motion for leave to intervene in this case does not violate the Plea Agreement. Thus, the question now to be decided is whether the government's intervention may be permitted under §3730(c)(3) and Rule 24(b).

Rockwell argues that "good cause" under the False Claims Act means that the government must demonstrate that it has "new evidence discovered after the first 60 days of the litigation [that] could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the qui tam relator to litigate alone." That language is from legislative history. S. Rep. No. 99-345, at 26 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. Rockwell contends that the publicly filed sentencing memorandum submitted by the government in support of the Plea Agreement discloses Rockwell's concealment from the DOE, the EPA, and the Colorado Department of Health, of contamination from "pondcrete" and "saltcrete" wastes to avoid compliance with state and federal regulations and to avoid "detrimental impacts on [award fee] evaluations" under its contract with DOE. This court has read that sentencing memorandum and finds that it does not, in itself, disclose a basis for concluding that Rockwell violated the False Claims Act. Significantly, the prosecution advised the court that DOE bore substantial responsibility for environmental and waste

management violations, attributing failures of oversight to an agency "culture" that placed nuclear weapons production above all else, and especially above compliance with environmental and hazardous waste laws and regulations.

"Good cause" under 31 U.S.C. §3730(c)(3) is not as limited as Rockwell suggests. The 1986 Senate Report, cited by Rockwell, describes the history of the False Claims Act, beginning with its original enactment in 1863, during the Civil War. The authority to file *qui tam* actions was deemed necessary to protect the government from fraudulent contractors. Courts interpreted the statute to permit a relator to proceed with *qui tam* actions even if he did not supply the information forming the basis of the claim. In the early 1940's some False Claims suits were brought by relators based on criminal indictments filed by the government. The government objected, arguing that a *qui tam* action should be barred when it was based only on information revealed in the criminal indictment. The race to the courthouse between the government and private parties infringed on the government's control over its criminal and civil fraud cases and hampered effective law enforcement. The Supreme Court found the statute to be restrictive of the government's control in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

This decision prompted the 1943 amendments in which the Congress established a jurisdictional bar to private suits based solely on information in the possession of the government at the time the suit was brought, even if the relator was the original source of the information. *United States v. Aster*, 275 F.2d 281 (3d Cir. 1960); *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1946). Under those amendments, if a court determined that a *qui tam* litigant was not a proper relator because of the jurisdictional bar, he lost any right to continue in the litigation, share in any proceeds, challenge the government's reasonable diligence, or object to settlements.

The 99th Congress passed the 1986 amendments to

strengthen the *qui tam* provisions to make them "a more effective vehicle for private individuals to disclose fraud" which was thought to be necessary "both for meaningful fraud deterrence and for breaking the current 'conspiracy of silence' among Government contract employees." S. Ref. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5279. The 1986 amendments were designed to strike a balance between encouraging private prosecution of fraudulent claims against the government and deterring frivolous or vexatious suits. The reward provision was changed to permit 25 to 30 percent of the recovery if the relator proceeds alone but only 15 to 25 percent if the government intervenes in the action. 31 U.S.C. §3730(d). Government intervention late in the proceedings may be unfair to a relator who has expended considerable resources to advance the case and then lose up to half of the reward for bringing the action. The language quoted by Rockwell from the Senate Report regarding "new evidence . . . [that] could escalate the magnitude or complexity of the fraud . . . ." must be read in the full context of the report. Such reading leads to the conclusion that the "good cause" requirement of §3730(c)(3) was intended to protect the interests of the relator.

In this case, James Stone is fully supportive of the government's motion to intervene. He has argued that this case is still in a very preliminary stage because Rockwell has resisted discovery. Judge Yock made a finding of undue delay in discovery in the case before the Federal Claims Court. The relationship of these two actions is apparent and now that the government has been permitted to raise the fraud issues in responding to Rockwell's claims, there is no prejudice to Rockwell in permitting intervention by the government in this case.

Even if good cause requires a showing of new evidence, the government has sustained that burden. DOJ-Civ was not privy to the information developed during the criminal investigation. Rule 6(e) of the Federal Rules of Criminal

Procedure prevented the prosecutors from disclosing what was developed in the grand jury proceedings. The publicly filed documents are not clear as to the role of the DOE officials. What knowledge they had and what reliance they placed on Rockwell's reports are relevant considerations in a fraud action. The declarations filed by John A. Kolar, DOJ-Civil Division trial attorney, persuasively show that information obtained during discovery in the claims court case and made available to him by counsel for Mr. Stone have been important to the decision to intervene.

What is of paramount importance is the public interest. The operation of Rocky Flats has fueled considerable controversy over many years and the highly publicized investigation and criminal prosecution have been the subject of public debate. The former members of the special grand jury have filed a separate civil action seeking an order releasing them from the grand jury oath of secrecy because they are in disagreement with the end result of their work and do not regard the Plea Agreement as a just disposition.

This civil action provides an appropriate forum for a public inquiry into the management of this important defense facility and participation in it by the goverment will add significantly to the completeness and fairness of any trial. Accordingly, it is

ORDERED that the motion to intervene is granted.

DATED: November 19, 1996

BY THE COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Chief Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel. JAMES S. STONE, | ) | |
| Plaintiff, | ) | 92 CR 107 M |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, | ) | |
| Defendant. | ) | |

SCHEDULING CONFERENCE TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 2:30 p.m. on the 5th day of December, 1996, in Courtroom C-203, United States Courthouse, Denver, Colorado.

* * *

[13] forfeiture.

MR. KOLAR: Absolutely. The claim is wholly forfeited.

THE COURT: Yeah.

MR. KOLAR: So that if we—

THE COURT: It's not a dollar for dollar; it's just forfeiture of the claim.

MR. KOLAR: It goes away.

THE COURT: Yeah.

MR. KOLAR: We would--we intend in the amended

complaint to assert the typical legal theories that we append to False Claims Act cases, such as common law fraud, unjust enrichment, breach of contract, all of which are obviously simply different theories based upon the same underlying facts. And one of the theories that we would assert in the amended complaint, or seek to, is common law fraud, the elements of which closely correspond to the elements of the special plea in fraud.

So if we succeed in this case on that theory, then we will have--Rockwell's claim will be forfeited in the Court of Federal Claims.

THE COURT: Well, what do you intend to do in this civil case, 89-1154, with respect to amended pleading?

MR. KOLAR: We would--well, we've agreed in the parts of the scheduling order we agree on to submit an amended complaint by December 20th. Most of that is not all that [14] problematic.

THE COURT: Now, is that going to be a consolidated complaint, amended complaint, with both the relator and the government?

MR. KOLAR: That question cuts right to the center of an issue that we're still trying to resolve with Mr. Stone's counsel. There are theories that overlap between the Claims Court case that we have been pursuing there, and the theories in this case. And then there are three issues that Mr. Stone has been asserting all along in this case that we have not been pursuing in the Claims Court case, and by the 20th, we have to--we're striving, we're going to strive to either come to one of--well, I suppose I won't count them, I'll just say what they are. One result would be that we adopt the--we only assert in the amended claim the ones that are already in--that we've been pursuing in the Claims Court case, and leave to Mr. Stone the others. Or we adopt all of them, or some subset of the three that Mr. Stone wants to pursue, or that Mr. Stone decides after further consultation

with us to abandon one or more of those other three claims. That is a possible result.

THE COURT: Well, there can still be a consolidated complaint but separate claims stated.

MR. KOLAR: That's right.

THE COURT: If that's the resolution. [15]

MR. KOLAR: Yes.

THE COURT: But if we're going to have an amended complaint, I'd like to have both plaintiff parties in it so that we don't have so many pleadings.

MR. KOLAR: I understand, Your Honor, and that seems to me to make sense.

But in any event, to go back to the issue about prejudice because of the Claims Court case, you know, the other point I think the Court needs to--I think the overriding point, quite frankly, that the Court has to consider is that Mr. Stone--I'll take the liberty of speaking for their interests for a moment--Mr. Stone is prejudiced if the case goes forward solely in the Claims Court and the case is stayed here. Mr. Stone can't participate in the Claims Court case, and I suspect, Your Honor, that if per chance Rockwell succeeds in that case, they would argue that their success against the United States in that forum creates a collateral estoppel effect against Mr. Stone's claims in this case. And it just seems to me basic justice that one of the parties who by statute is permitted to, and in fact brought the case to start with, ought to be-- the case should proceed in the forum where that party can participate.

Finally, we--Mr. Haddon said, you know, all the parties to some extent try to assess these--where their interests are going to be, where they're going to be most

* * *

[26] Now, the Court's ruling that resolved those two issues, one I believe was in the criminal case which said we--

I don't find this reasonable understanding argument to be meritorious, and the second ruling was just issued in this case, which was there is no statutory good cause. But that is precisely the argument that I don't think there was ever any dispute was properly raised--

THE COURT: There is no statutory good cause?

MR. KOENIGS: I apologize. There is statutory, yes.

THE COURT: Yes. I thought that's what I ruled.

MR. KOENIGS: Right. I misspoke. But that is precisely the issue that we raised in our criminal motion, precisely the issue that is properly on appeal there. The only difficulty is the order was entered in this case. And so it does seem that for the Tenth Circuit--I cannot understand how the issue can properly be dealt with on appeal. Beyond that, I believe that the issue was raised and was properly decided in that case, and that's why I candidly concede that a proper resolution of the issue is to either issue that order jointly in both cases, or incorporate that order by reference in the criminal case, because that is part and parcel, I respectfully submit that it is--that the criminal case is dependent in part on that ruling, because that was precisely the argument made by Rockwell in that criminal proceeding.

THE COURT: Okay. Well, rather than attempting to deal [27] with these issues in terms of fairness and prejudice, I think that the appropriate thing is to deal with them in accordance with the statute and the rules. And as I indicated in the beginning, I think that each of these decisions, the one to deny the defendant's motion in 92 CR 107 to really enjoin intervention in the civil case as a violation of the plea agreement using ancillary jurisdiction under the criminal case. That was resolved on its own merits with respect to this Court's interpretation of the plea agreement, and that the motion to intervene in the Stone case was resolved on the basis of the interpretation of the statutory requirement of good cause for intervention, late

intervention, and that these are independent grounds for the rulings. And I'm going to still treat them separately.

So with respect to the motion to stay enforcement of the order in 92 CR 107, it's denied. And with respect to the motion of Rockwell to certify the order granting the government's motion to intervene in 89 M 1154, it's denied because the statutory requirements under 28 USC 1292(b) are not met. That then--and of course I'm sure that counsel will be able to inform the Court of Appeals in the criminal appeal of the existence of the intervention ruling by including it in an appendix or whatever the appropriate procedure is before the Court of Appeals so that you not be denied the opportunity to give the Court of Appeals a complete picture.

[28] Now, that takes us back to the scheduling conference in the civil case, Stone, and I want to talk about that in several--with several preliminary observations. I note in my general review of the record of that case that when it was before Judge Carrigan, there were a number of status conferences and the like, and there were also apparently settlement conferences and efforts undertaken by Magistrate Judge Pringle in that regard, and some discovery issues with him as well. In fact, as has been pointed out in this draft of scheduling order, there are some motions to be decided yet, and one is an objection to a magistrate judge's recommendation, I believe.

I'm not going to divide this case, the Stone case, between me and a magistrate judge. I'll do my own scheduling and discovery and motion practice.

The second thing is that I don't intend, and I just mention this so that counsel don't have to be tender about it, I don't intend to reassign this case because of other litigation that occupies me. I can do more than one thing at a time. So this case doesn't need another transfer of judges.

And it does seem to me in this quick review of the

scheduling order, and of course I didn't expect you to be able to come in this afternoon with an agreed scheduling order. In fact I thought better of it, I think, when I noted [29] that we had sent out the forms for you to work with, that this is more like a status conference than a true scheduling conference is normally done here. But it has helped I think to look at this draft, and it is obvious that we need an amended complaint, and it should be a consolidated amended complaint, as we've already discussed, and December 20th seems a reasonable time to do that.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CIVIL ACTION NO. 89-C-1154

UNITED STATES OF AMERICA,
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION, THE BOEING CORP.,
BOEING NORTH AMERICAN, INC.

Defendants.

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**AMENDED COMPLAINT**

False Claims Act [31 U.S.c. §§ 3729-3733]
Common Law Fraud, Breach of Contract,
Payment By Mistake, and Unjust Enrichment

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Plaintiff, United States of America, and relator, James S. Stone, by their respective attorneys, allege as follows:

**PARTIES**

1. Plaintiff is the United States of America (hereinafter "United States" or "government"), suing on behalf of its agency, the United States Department of Energy ("DOE").

2. The relator, James S. Stone, is a resident of the District of Colorado
and a former employee of Rockwell. Mr. Stone initially commenced this lawsuit on July 5, 1989.

3. Defendant Rockwell International Corporation ("Rockwell") is a Delaware corporation headquartered in Seal Beach, California in Orange County, California.

4. Defendant The Boeing Corporation ("Boeing"), is a Delaware corporation headquartered in Seattle, Washington. On information and belief, during December 1996, Boeing acquired or merged with components of Rockwell, including the Rockwell component which held and performed the contract at issue in this action. Also, on information and belief, Boeing, pursuant to this acquisition or merger transaction, formed a subsidiary called "Boeing North American, Inc." ("Boeing NAC"), to which any and all liability by Rockwell to plaintiff United States under the contract at issue in this action was assigned or transferred. Accordingly, the United States and relator Stone name Boeing and Boeing NAC as additional defendants herein, based upon their assumption of liability from Rockwell.

## JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter pursuant to 31 U.S.C. §§ 3729-3732, 28 U.S.C. § 1345, and its general common law and equitable jurisdiction.

6. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391, and 31 U.S.C. § 3732.

## FACTS ALLEGED BY THE UNITED STATES AND RELATOR

7. The United States and the relator allege the following facts.

### A. The Rockwell Contract

8. Rockwell and the United States, acting through a predecessor agency to the Department of Energy ("DOE), to wit, the Atomic Energy Commission ("AEC"), entered into Contract No. AT(29-2)-3533, effective June 30, 1975, for the operation by Rockwell of the Rocky Flats nuclear weapons plant.

9. Upon the transfer of the functions and responsibilities of the AEC to the Energy Research and Development Administration ("ERDA"), the contract was redesignated Contract No. E(29-2)-3533 by Modification ("Mod") No. M002, effective October 1, 1976, and was

amended in certain particulars specified in Mod 2.

10. Upon the transfer of the functions and responsibilities of ERDA to the DOE, the contract was subsequently redesignated as Contract No. DE-AC04-76DP03533. By Mod 005 to Contract No. DE-AC04-76DP03533, the contract was converted from a cost-plus-fixed-fee type to a cost-plus-award-fee type ("CPAF"), effective February 1, 1979.

11. Effective January 1, 1981, Rockwell and DOE entered into a Supplemental Agreement, which agreement constituted the 19th Mod to Contract No. AT(29-2)-3533, designated "Mod 019 to Contract DE-AC04-76DP03533," which provided in pertinent part:

> WHEREAS, the Government and the Contractor entered into Contract AT(29-2)-3533 on January 8, 1975, effective June 30, 1975 for the performance by the Contractor of certain work and services; and
>
> WHEREAS, this contract has previously been amended by Modifications Nos. 1 through A018; and
>
> WHEREAS, the parties hereto desire to extend the term of said contract, [and] to amend it in certain other respects ....
>
> * * * *
>
> NOW, THEREFORE, the parties agree that the contract, as previously amended, is hereby further amended ... .

Mod 019 governed Rockwell's performance during the time period from January 1, 1981 through December 31, 1985.

12. Effective January 1, 1986, Rockwell and DOE

entered into Mod M087 of Contract DE-AC04-76DP03533, which governed Rockwell's performance from January 1, 1986 through December 31, 1988. Mod M087 contained language similar to that in paragraph 46, above, stating that it was an extension of Contract AT(29-2)-3533.

13. Effective January 1, 1989, Rockwell and DOE entered into Mod M124 of Contract DE-AC04-76DP03533, which was to govern Rockwell's performance commencing January 1, 1989. Mod M124 contained language similar to that in paragraph 46, above, stating that it was an extension of Contract AT(29-2)-3533.

14. In February 1989, Rockwell and DOE entered into Mod M128, denominated "Supplemental Agreement to Contract DE-AC04-76D03533," which amended the contractual provisions relating to the amounts potentially payable to Rockwell for award fees. This Mod was effective retroactive to October 1, 1988.

15. From time to time, during the period from January 1, 1981 through December 31, 1989, Rockwell entered into other modifications to the contract, all of which constituted modifications, amendments, and extensions of Contract AE(29-2)-3533. Effective January 1, 1990, Rockwell was succeeded by another company, EG&G, as the management and operating contractor for Rocky Flats. Contract AE(29-2)-3533 between Rockwell and the DOE, and its various modifications, amendments and extensions, is referred to hereinbelow as "the Rocky Flats Contract."

B. <u>Pertinent ES&H Laws and Requirements</u>

16. The Rocky Flats contract specifically stated that Rockwell was required to comply with certain environmental, safety and health ("ES&H") statutes, laws, regulations, standards, and rules and orders of DOE in managing and operating the Rocky Flats Plant.

17. Beginning in the early or mid-1980's, and continuing through December 31, 1989, the ES&H statutes, laws, regulations, standards, and rules and orders of DOE with which Rockwell, by contract, was required to comply in

managing and operating the Rocky Flats Plant included, for instance, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seg., as amended, and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, et seg., and various DOE orders implementing requirements of these regulatory schemes. In order to satisfy its contractual obligations to comply with applicable ES&H laws and regulations, and to continue to receive payments under its contract, Rockwell submitted applications and related regulatory materials to the United States and certain state agencies, and was required to fully and truthfully disclose to government matters relating to its ES&H performance at the Rocky Flats plant.

18. The applicable ES&H orders included, for example, DOE Order 5480.2, entitled "Hazardous and Radioactive Mixed Waste Management," effective December 13, 1982, which acknowledged that DOE operations not conducted under the authority of the Atomic Energy Act were subject to EPA and State regulations relating to RCRA; and DOE Order 5820.2, entitled "Radioactive Waste Management," effective February 6, 1984, in which DOE established policies and guidelines for the management of radioactive wastes by its contractors. Other orders governing performance by DOE contractors in the ES&H area were implemented, and/or updated or amended, by DOE from time to time.

1. RCRA

19. The RCRA prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. In order to treat, store or dispose of hazardous wastes at an interim facility, RCRA requires compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations ("C.C.R.") 1007-3.

20. As used below, "hazardous wastes" are those substances and materials listed or otherwise identified as hazardous wastes in 6 C.C.R. 1007-3. "Mixed wastes" or "mixed hazardous wastes" are wastes which contain both radioactive wastes and non-radioactive hazardous wastes. "Low-level mixed wastes" are radioactive wastes containing both transuranic material at or below 100 nanocuries per gram and hazardous wastes.

21. On July 31, 1986, DOE, the United States Environmental Protection Agency ("EPA") and the Colorado Department of Health ("CDH") entered into a Compliance Agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated by EPA and CDH ("RCRA Compliance Agreement"). Rockwell knew of this agreement.

22. On May 1, 1987, DOE issued a "final interpretive rule" making it clear that RCRA applied to all DOE mixed wastes, including low-level mixed wastes. Under this rule, effective June 1, 1987, DOE stated that the non-radioactive hazardous component of mixed wastes at DOE facilities (including Rocky Flats) was subject to RCRA regulation. Rockwell knew of this rule.

2. <u>The CWA</u>

23. One of the country's principal water pollution laws is the Clean Water Act ("CWA" or "the Act"). The Act prohibits the discharge of any pollutant from any point source into "navigable waters" except in accordance with the terms and conditions of a National Pollutant Discharge Elimination System ("NPDES") permit. See 33 U.S.C. §§ 1311(a), 1342. NPDES permits regulate waste water treatment facilities, and establish specific prohibitions, terms and conditions on discharges from a particular pollution source, regulate the type, amount and manner of such discharges and require that they be carefully monitored and reported to EPA or other appropriate authorities. The permit system, which requires the permit holder to report any and all violations of the permit, is one of

the statute's principal means for maintaining (and improving) the nation's important water resources.

24. The CWA prohibits the discharge of any pollutants from a point source into waters of the United States except in accordance with the terms and conditions of a NPDES permit, issued pursuant to 33 U.S.C. § 1342.

25. Rocky Flats has had several NPDES permits from 1974 to the present time (collectively, "NPDES permits"). For instance, in April 1981, EPA issued a NPDES permit to Rocky Flats. In November 1984, after that permit expired, EPA issued another NPDES permit to Rocky Flats. Among other things, these NPDES permits set specific limits on the kinds of discharges that Rockwell, as operator, could make into waterways. The NPDES permit also governed Rockwell's spray irrigation operations.

**C. Provisions in the Rocky Flats Contract Expressly Requiring ES&H Compliance**

26. As already noted, the Rocky Flats Contract, and its various mods, contained provisions expressly requiring Rockwell to protect human health and to comply with certain ES&H requirements and standards.

27. By way of example, Mod M087 of the Rocky Flats contract, in Clause 16, provided in pertinent part that Rockwell agreed to comply, inter alia, with all requirements of Section 308 of the CWA, 33 U.S.C. § 1318, relating to inspection, monitoring, entry, reports, and information, and to use best efforts to comply with clean water standards, including any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the CWA or contained in an NPDES permit. Mod M087 also provided, in Clause 48, that Rockwell would comply with all applicable safety and health regulations and requirements, including reporting requirements, of DOE. By reason of various DOE orders, the July 31, 1986 RCRA Compliance Agreement, and the May 1, 1987 final interpretative rule, RCRA compliance was among the health and safety requirements specifically imposed by DOE

upon Rockwell.

28. Mod M124, as amended by Mod M128, of the Rocky Flats Contract also required Rockwell to comply with ES&H requirements identical or similar to those described above, for the period October 1, 1988 through December 31, 1989. These Mods also contained language at Clause 74, which provided:

> Except as otherwise directed by the Contracting Officer, the Contractor [Rockwell] shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this contract is performed.

Previous mods contained identical or similar language.

29. As more particularly alleged below, Rockwell did not comply with the ES&H provisions of the Rocky Flats Contract; to the contrary, Rockwell materially breached those provisions, including by committing numerous felony and misdemeanor violations of RCRA and the CWA in the course of its management and operation of the Rocky Flats plant. Furthermore, Rockwell concealed its material breaches and other ES&H problems from DOE, and, from time to time, misrepresented to DOE that it was complying with the contract. Rockwell thereby fraudulently induced DOE, inter alia, (a) to pay Rockwell more in award fees and other fees for performance, and to expend more in costs, than DOE otherwise would have paid and incurred, had DOE known the truth; and (b) extend the Rocky Flats Contract, including through Mod M124 of the Rocky Flats Contract, as amended by Mod M128.

**D. Rockwell's Breaches of the Rocky Flats Contract and its Fraudulent Concealment and Misrepresentation to DOE**

1. Pondcrete and Saltcrete

30. Under the RCRA Compliance Agreement described above, Rockwell was required to remove sludge from certain surface impoundments located on the Rocky Flats site, known as the "solar ponds." Rockwell undertook to do so by mixing the sludge from the solar ponds with cement to form a substance known as "pondcrete." Pondcrete took the form of large rectangular blocks weighing over 1,000 pounds a piece. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788 on the Rocky Flats plant site.

31. "Saltcrete" was a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374 on the Rocky Flats site, shaped in large rectangular blocks weighing over 1,000 pounds a piece. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374.

32. Beginning in July 1986, with the execution of the RCRA Compliance Agreement, Rockwell was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

33. Colorado Hazardous Waste Regulations, found at 6 C.C.R. 1007-3, required Rockwell (a) to minimize the possibility of any unplanned release of hazardous waste constituents to air, soil, or water, (b) to handle pondcrete and saltcrete containers in a manner that would prevent them from rupturing and leaking, (c) to remedy any deterioration or malfunction of equipment or structures that might lead to an environmental or human health hazard, and (d) upon discovering that pondcrete and saltcrete containers were not in good condition and had begun to leak, to transfer such wastes to containers in good condition, to otherwise manage such wastes in compliance with RCRA interim status requirements, and to otherwise prevent their leakage into the environment.

34. On or about June 15-24, September 11-30, and December 7-16, 1987, February 15-24, May 6-25, July 18-27,

September 14-23, 1988 and February 6-15, 1989, Rockwell knowingly stored approximately 12,000 pondcrete and saltcrete blocks on an outdoor pad known as the "750 Pad" in violation of RCRA, all as set forth in the Plea

35. Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992, the terms and admissions of which are hereby incorporated by reference.

36. On or about October 5-9, November 16-20, December 14-18, 1987, January 18-22, February 22-26, March 21-25, April 18-22, May 16-20, June 6-15, August 1-10, and December 5-14, 1988 and June 1-10, 1989, Rockwell knowingly stored approximately 5,000 pondcrete and saltcrete blocks on another outdoor pad known as the "904 Pad" in violation of RCRA, all as set forth in the Plea Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992.

37. Beginning as early as April 1987, and probably earlier, Rockwell knew (a) that a substantial number of pondcrete and saltcrete blocks were not in fact solid; (b) that pondcrete was often a sludge-like or semi-liquid material; (c) that saltcrete was prone to expansion and crystallization; (d) that the processes it was using to manufacture pondcrete and saltcrete were inadequate to produce blocks of a uniform solidity that complied with RCRA requirements, and that the pondcrete manufacturing equipment was deteriorating and malfunctioning; (e) that the inspection process for pondcrete and saltcrete was inadequate to detect blocks that were insufficiently solid before the blocks were placed on the 750 and 904 Pads; (f) that various pondcrete and saltcrete containers on the 750 and 904 Pads had deteriorated, but that Rockwell had failed to remedy their condition; and (g) that pondcrete and saltcrete constituents were leaching from the blocks and were running off the 750 and 904 Pads, but that Rockwell had failed to correct this condition.

37. DOE, EPA, and CDH were led by Rockwell

to believe that the pondcrete and saltcrete blocks were sufficiently solid to comply with RCRA and the applicable provisions of 6. C.C.R. 1007-3, and the RCRA Compliance Agreement, and EPA permitted the storage of pondcrete and saltcrete blocks on the 750 and 904 Pads under these provisions based upon its belief that the blocks were sufficiently solid. From time to time, including on or about June 4, 1987, Rockwell falsely represented to DOE, EPA, and CDH that the blocks were sufficiently solid such that their storage on the Pads should be permitted pursuant to RCRA, 6 C.C.R. 1007-3, and the RCRA Compliance Agreement.

38. From time to time, in documents known as "Self-Analyses," and in other documents and records, which Rockwell submitted to DOE in furtherance of DOE's process of determining Rockwell's award fee and other payments, Rockwell misled DOE into believing that Rockwell was complying with RCRA and with the RCRA Compliance Agreement, when, in fact, Rockwell was not so complying. Furthermore, Rockwell misrepresented and concealed other material information concerning its ES&H record from DOE. The instances set forth below are exemplary, but not exhaustive, of Rockwell's misrepresentations and concealments.

39. For example, on or about June 23, 1987, in its award fee Self-Analysis, Rockwell told DOE that "a RCRA/CERCLA Program has been established and staffed effective June 8, 1987... [and] all Compliance Agreement dates have been and are being met."

40. Again in the September 1987 Self-Analysis, Rockwell advised DOE that "Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives . . . The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats."

41. In its self-analyses dated December 23, 1987 and April 5, 1988, Rockwell again told DOE that "[a]ll RCRA Compliance Agreement requirements and schedules are being met. These statements were false and misleading for the reasons explained above.

42. DOE relied upon these and other misrepresentations and concealments, and Rockwell's various misrepresentations and concealments induced and caused DOE to award to Rockwell higher award fees, and to incur more in costs, than DOE otherwise would have awarded and incurred, had DOE known the truth.

43. Rockwell's improper handling of the pondcrete and saltcrete blocks resulted in the release of hazardous materials. In fact, on or about May 23, 1988, and possibly on other occasions, there was a spill of pondcrete blocks on the Pads. At this time, DOE, EPA, and CDH began to become aware of some aspects of the pondcrete and saltcrete problems described above. However, following May 23, 1988, Rockwell continued to conceal from, and misrepresent to, DOE (and others including the public and Congress) the fact that it had become aware of the pondcrete and saltcrete problems long before May 23, 1988, as well as the full extent of those problems. Instead of disclosing the truth about its knowledge, Rockwell created the false and misleading impression that it was ignorant of the problems until May 23, 1988. By its misrepresentations and omissions, Rockwell induced and caused DOE to award it higher award fees than DOE would otherwise have awarded, had DOE known the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

2. <u>Concentrated Salt Brine</u>

44. As indicated above, as part of the July 31, 1986 RCRA Compliance Agreement, it was agreed that the solar ponds would be closed and their contents removed in

accordance with RCRA procedure (thereby requiring the production of pondcrete).

45. "Concentrated salt brine" was a waste generated from the liquid waste treatment processes in Building 374. From time to time prior to July 31, 1986, Rockwell transferred concentrated salt brine to the Solar Pond 207C, and stored the salt brine therein. Due to the closure of the solar ponds pursuant to the RCRA Compliance Agreement, in part because they were leaking into the environment, Rockwell was prohibited from transferring additional concentrated salt brine to Solar Pond 207C except under certain "emergency" circumstances, which were not satisfied in the case of the transfers described in the next paragraph, and probably others.

46. On or about August 13-17, October 9-12 and 14-18, November 15-19, and 24-27, and December 17-18, and 20-25, 1987, and January 4-8, 23-27, and January 29-February 1, February 3-7, 20-24 and February 27-March 2, March 6-10 and April 8-12, 1988, Rockwell knowingly transferred, treated and stored concentrated salt brine from Building 374 in Solar Pond 207C in violation of RCRA, all as more specifically set forth in the Plea Agreement and Statement of Factual Basis agreed to by Rockwell on or about March 26, 1992.

47. Rockwell failed to inform DOE that it was violating RCRA by transferring concentrated salt brine to Solar Pond 207C after entering into the RCRA Compliance Agreement. To the contrary, on or about August 22, 1988, for example, Rockwell misrepresented to DOE that, except for intercepted groundwater being returned to the solar ponds, "[n]o other waste is being accepted by the Solar Ponds, and has not been accepted for over a year," that is, since the summer of 1987. Rockwell thereby induced DOE to pay Rockwell higher award fees than DOE would have paid, had DOE known the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor

performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

3. CWA Violations

48. As stated above, Rockwell's Rocky Flats contract required Rockwell to comply with all applicable state and federal laws, including the CWA. The contract also required Rockwell to help DOE obtain permits required by such laws, and for Rockwell to comply with all required permits, including the NPDES permit, and other laws.

49. In 1984, or earlier, a NPDES permit was issued which authorized certain discharges at Rocky Flats. The NPDES permit was required by law. Under the NPDES permit, Rockwell, as the operator of the plant, was required to comply with the provisions of the CWA. Under the permit, Rockwell was required to conduct spray irrigation at the Rocky Flats plant in accordance with "good engineering practices". The NPDES permit also contained descriptions of the manner and types of discharges that were allowed, the monitoring requirements with which the permit holder was bound to comply, and reporting requirements.

50. Spray irrigation was intended to be a means of properly disposing of waste water (also known as effluent) generated by the sewage treatment plant at the Rocky Flats plant. Spray irrigation consisted of pumping effluent water from the B-3 Pond, which held sewage treatment waste water, to a system of pipes laid on the ground, from which the waste water was then sprayed over the fields surrounding the Rocky Flats plant. The theory behind spray irrigation was that the waste water would be disposed of by evapotranspiration (a combination of evaporation and uptake by plants--resulting in transpiration) and/or percolation (soaking into the ground), with no runoff or discharges of the waste water from the fields into waterways around Rocky Flats.

51. Based upon the presumption (later shown to be incorrect) that spray irrigation was being properly

performed such that effluent did not run off the fields into the waterways around the plant, Rockwell did not have to meet the same stringent testing procedures and contamination limits under the CWA and NPDES permit for the waste waters that were spray irrigated, as it had to meet if those same wastes were directly released into waterways.

52. In October 1984, Rockwell violated the Plant's NPDES permit when spray irrigation waste water ran off a spray field into McKay Ditch and flowed downstream to Walnut Creek below permitted Outfalls No. 005 and No. 006 at the A-4 and B-5 Ponds, respectively. On October 31, 1984, Rockwell formally notified DOE in writing of this runoff incident resulting from spray irrigation, and that it constituted a NPDES permit violation. The EPA advised DOE that this runoff incident violated the NPDES permit.

53. Rockwell assured DOE that such spray irrigation runoffs would not re-occur.

54. However, on March 2, 1987, a DOE employee observed spray irrigation effluent from the South Spray Field running to Woman Creek. The DOE worker reported the incident to DOE and Rockwell officials. Rockwell had not previously reported this or certain other spray irrigation problems to DOE. Once, DOE learned of it, however, as required under the NPDES permit, on March 6, 1987, Rockwell wrote a letter formally notifying DOE of the March 2, 1987 spray irrigation runoff incident, and that it violated the NPDES permit. This incident was also reported to EPA and CDH.

55. Rockwell again assured DOE that similar runoffs would not re-occur, and promised to take corrective actions to prevent future occurrences.

56. Rockwell's award fee was impacted by this second runoff incident. In DOE's award fee evaluation of Rockwell for the period of October 1, 1986 to March 31, 1987, DOE cited the NPDES violation as a "notable deficiency."

57. As discussed above, under the CWA, DOE and Rockwell, as operator of the plant, were required to report to EPA and CDH on a monthly basis any violations of the NPDES permit, including violations resulting from spray irrigation operations. DOE required Rockwell to notify DOE in writing on a monthly basis of any and all violations of the NPDES permit. DOE used this information supplied by Rockwell, among other things, to notify EPA and CDH of any violations.

58. Rockwell used a document titled Monthly Monitoring Report (hereinafter "MMR" or "MMR report") to identify and disclose to DOE any and all NPDES permit violations occurring during each prior month. Rockwell submitted a MMR report to DOE every month during the time periods at issue.

59. Rockwell knew that it was required to report in the MMR any and all violations of the NPDES permit resulting from Rockwell's spray irrigation practices.

60. After March 2, 1987 and through at least July 1989, Rockwell made numerous false statements in its MMR reports to DOE to conceal Rockwell's violations of the CWA and the NPDES permit, which violations arose from Rockwell's spray irrigation in violation of good engineering practices. Although Rockwell knew that it violated the NPDES permit on at least 40 occasions between May 18, 1987 and June 23, 1989, Rockwell falsely reported to DOE that it had not violated the NPDES permit during such time period, and otherwise concealed and omitted such violations from the MMR reports it provided to DOE, in this and prior periods.

61. In its criminal plea agreement, Rockwell admitted that it "knowingly" violated the NPDES permit and the CWA on the following days: May 18, June 19, July 9, 10 and 22, August 4, November 15 and December 4, 8, 9 and 25, 1987, January 4, March 2, April 22, May 19-20, November 14 and December 2, 9, 15 and 27, 1988, and January 7, February 1, 2, 8, 13, 20 and 25, March 4, 9, 28 and 30, April

11 and 21, May 10, 25 and 31 and June 5, 15 and 23, 1989.

62. Rockwell also admitted in its criminal plea that its spray irrigation practices caused substantial runoff from the East Spray Field into the North Walnut Creek drainage (including the A-4 Pond), the South Walnut Creek drainage (including the B-4 and B-5 Ponds) and the Woman Creek drainage (including the C-2 Pond), and that it knowingly spray irrigated over and adjacent to the "East Trenches," an abandoned burial ground for radioactive and hazardous wastes. Rockwell further admitted in its plea that these and other spray irrigation practices were in violation of the NPDES permit requirements that spray irrigation be done utilizing good engineering practices and prohibiting the bypassing of NPDES monitoring facilities.

63. Rockwell failed to disclose in its MMR reports any of the 40 instances of knowing violations contained in the criminal plea agreement.

64. In addition to omitting or failing to report to DOE in Rockwell's MMR reports its 40 knowing violations of the NPDES violations, Rockwell made affirmative false statements in many of the affected MMR reports regarding these violations. For instance, in certain of the MMR reports between May 1987 and July 1989, Rockwell affirmatively misrepresented to DOE that (1) no violations of the NPDES permit occurred during the month, and/or (2) no spray irrigation occurred during the month, or on certain days of the month, because spray irrigation in conformity with good engineering practices had not been possible due to weather and/or ground surface conditions.

65. Rockwell also provided DOE with draft letters containing information for DOE to pass on to EPA and CDH regarding whether or not violations had occurred during each month. That draft language typically mirrored the language in the MMR reports Rockwell provided to DOE, i.e. Rockwell stated for the majority of months that there were no violations of the NPDES permit relating to spray irrigation or otherwise concealed the spray irrigation

violations. Rockwell's draft statements were false or fraudulent for the reasons explained above.

66. Rockwell caused DOE to pass along such false or fraudulent statements to EPA and CDH.

67. Rockwell made other false or misleading statements regarding the spray irrigation violations in other documents provided to DOE. For instance, Rockwell made false statements in the NPDES permit renewal process by failing to identify runoff of waste water from spray irrigation as a known potential contamination sources that entered various ponds at Rocky Flats, including Ponds A-4, B-5, and C-2. Rockwell also failed to include any of its 40 knowing criminal violations of the NPDES permit in the self-analyses Rockwell submitted to DOE as a part of the award fee evaluation process.

68. Rockwell's failure to inform DOE that it was violating the NPDES permit, as required by law, as well as its false statements that it had not violated the CWA, among other misrepresentations and omissions, induced and caused DOE to pay Rockwell more for Rockwell's performance than DOE would have paid, had Rockwell told DOE the truth, and to continue to allow Rockwell to perform the contract, whereas, once DOE began to learn the true facts about Rockwell's poor performance, DOE took steps to replace Rockwell with a new contractor (i.e., EG&G).

**E. Rockwell's Fraudulent Inducement of Contract Extensions**

69. By reason of its concealment and misrepresentation of ES&H violations, Rockwell fraudulently induced and caused DOE to enter into the extensions of the Rocky Flats contract.

70. For example, following the entry of its criminal guilty plea on March 26, 1992, Rockwell submitted to the criminal sentencing court a document styled "Defendant's Sentencing Memorandum."

71. As admitted by Rockwell in Defendant's Sentencing Memorandum, 20
DOE's "Prerenewal Appraisal" of Rockwell's performance during the period October 1, 1984 through June 30, 1987 concluded:

> Waste Management operations at Rocky Flats have been heavily impacted by the Resources Conservation and Recovery Act (RCRA). A direct outgrowth is a tri-party agreement between DOE, the Environmental Protection Agency (EPA), and the State of Colorado which now governs the handling of both hazardous wastes and mixed wastes (low level transuranic wastes combined with hazardous wastes) at Rocky Flats. Rockwell's performance has been in the very good/excellent range.
>
> * * * *
>
> All deadlines required by the Rocky Flats Compliance Agreement were met and RCRA compliance, with approved exceptions [none of which encompassed Rockwell's criminal violations], was achieved.

72. Furthermore, Rockwell specifically acknowledged
that

> This favorable appraisal formed the basis for DOE's renewal of Rockwell's site management contract at Rocky Flats for the five-year period commencing January 1, 1989.

Thus, RCRA compliance was a material reason that DOE renewed the contract with Rockwell at this time (and at others). However, as stated above, Rockwell was not in fact

complying with RCRA and other pertinent environmental laws, regulations, and orders, a fact which Rockwell concealed from DOE, thereby obtaining contract renewal.

F. DOE's Termination of Rockwell's Contract

73. On June 6, 1989, agents of the Federal Bureau of Investigation and EPA raided the Rocky Flats Plant pursuant to a search warrant for evidence of violations of the ES&H criminal laws, regulations, and DOE orders.

74. Following this raid, DOE began to learn about the full extent of Rockwell's violations of the ES&H criminal laws, regulations, and DOE orders, and about Rockwell's related misconduct.

75. Following the raid, because of Rockwell's poor ES&H performance and its violations, DOE determined that Rockwell should no longer be the management and operations contractor for Rocky Flats, and that a new contractor should take over the plant. DOE began consideration of the basis upon which it might terminate Rockwell, and of ways in which a transition to a new contractor could be effectuated without undue hazard and risk, given the highly dangerous nuclear activities carried out at Rocky Flats.

76. Before DOE could reach any final conclusions with respect to these questions, Rockwell filed a lawsuit in the United States District Court for the District of Columbia requesting, inter alia that it be released from its contractual obligations under the Rocky Flats Contract.

77. Following Rockwell's initiation of that lawsuit, Rockwell and DOE agreed that Rockwell's management and operation of Rocky Flats would end on or about December 31, 1989, and be taken over by a new contractor, EG&G, upon that date.

G. Rockwell's False and Fraudulent Claims to DOE

78. By reason of the foregoing conduct, Rockwell knowingly presented, and caused to be presented, to an officer and employee of the United States government false

and fraudulent claims for payment and approval, to wit, its various requests and demands, under its contract and otherwise, for money or property of the United States in the form of payments of award fees and other fees for the management and operation of Rocky Flats during the time periods when Rockwell was violating the ES&H laws, regulations, and DOE orders, failing to disclose other material aspects of its poor ES&H record, and committing other misconduct, as pleaded above, in violation of 31 U.S.C. § 3729(a)(1).

79. Furthermore, by reason of the foregoing conduct, Rockwell knowingly made, used, and caused to be made and used false records and statements to get false and fraudulent claims paid and approved by the government, which false records and statements included, inter alia, the various false and misleading statements, representations, concealments, and omissions described above, in violation of 31 U.S.C. § 3729(a)(2).

80. Rockwell is liable for common law fraud and breach of contract. DOE also paid Rockwell monies under a mistake of fact regarding Rockwell's performance under the contract and compliance with environmental laws. Rockwell also was unjustly enriched by receiving high award fees and other payments under the contract while it was violating criminal environmental laws and otherwise engaging in misconduct while performing the contract.

**MONETARY DAMAGES**

81. By reason of these false statements and other misconduct by Rockwell, the government suffered monetary damages, and Rockwell was paid as a result of mistakes of fact, and Rockwell was unjustly enriched.

82. The United States suffered monetary damages because the United States paid Rockwell more in award fees and other monies for performing the contract, and incurred more in costs, than DOE otherwise would have paid, had DOE known the truth about Rockwell's poor ES&H performance, and Rockwell's various violations in

ES&H areas. Further, the United States continued to keep Rockwell as contractor at Rocky Flats which it would not have done, had it known the truth.

**COUNT ONE**

(False Claims Act: 31 U.S.C. § 3729(a)(1) and (2))

83. This is a claim by plaintiff United States and relator Stone against defendants Rockwell, Boeing, and Boeing NAC for treble damages and civil penalties under the False Claims Act, 31 U.S.C. § 3729(a)(1) and (a)(2) for Rockwell's knowingly presenting or causing to be presented to the government false or fraudulent claims for money or property.

84. Plaintiffs incorporate by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

85. By virtue of the acts described above, Rockwell knowingly presented, and caused to be presented, to an officer and employee of the United States government false and fraudulent claims for payment and approval, to wit, its various requests and demands, under its contract and otherwise, for money or property of the United States in the form of payments of award fees and other fees for the management and operation of Rocky Flats during the time periods when Rockwell was violating the ES&H laws, regulations, and orders, and omitting to fully and truthfully inform the United States of other ES&H problems and other misconduct, as pleaded above, in violation of 31 U.S.C. § 3-729(a)(1) and (a)(2).

86. Furthermore, by reason of the foregoing conduct, Rockwell knowingly made, used, and caused to be made and used false records and statements to get false and fraudulent claims paid and approved by the government, which false records and statements included, inter alia the various false and misleading statements, representations, concealments, and omissions described above.

87. By reason of Rockwell's violations of the False Claims Act, the United States was damaged because

it paid more in fees and other monies for the operation of Rocky Flats, than it would have paid had it known the truth.

**COUNT TWO**

(Common Law Fraud)

88. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for common law fraud.

89. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

90. Rockwell made false material representations to, and/ or omitted material information which it had a duty to disclose, to the United States, and did so with intent to defraud the United States, with knowledge of their falsity, and/or with reckless disregard for their truth. Rockwell intended that the United States act in reliance upon these representations and/or omissions.

91. The United States did in fact rely upon Rockwell's false and/or fraudulent material representations and omissions, and, as a result, the United States was damaged because it paid more in fees and other monies for the operation of Rocky Flats, than it would have paid had it known the truth.

**COUNT THREE**

(Breach of Contract)

92. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for breach of contract.

93. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

94. By virtue of the acts set forth above, Rockwell breached its contract with the United States for the operation of Rocky Flats.

95. By reason of Rockwell's breach of contract, the United States sustained damages.

## COUNT FOUR

(Payment By Mistake of Fact)

96. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for payment by mistake of fact.

97. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

98. The United States made payments to Rockwell under the contract in the mistaken belief that Rockwell was fully performing the contract, complying with all laws (including environmental laws), and properly disclosing any and all violations of such laws. Such payments were made by mistake of fact and were not authorized by law.

99. As a result of such mistaken and unauthorized payments, the United States sustained damages.

## COUNT FIVE

(Unjust Enrichment)

100. This is a claim by plaintiff United States against Rockwell, Boeing, and Boeing NAC, for payment by mistake of fact.

101. Plaintiff United States incorporates by reference herein the allegations made above in paragraphs 1 through 82, inclusive.

102. Plaintiff paid to defendant monies by which, as a result of the facts and circumstances stated above, defendant has been unjustly enriched at the expense of the United States.

103. By reason of these payments, plaintiff is entitled to the return of the amount by which defendant has been unjustly enriched.

## ADDITIONAL FACTS AND CLAIMS ALLEGED BY RELATOR

104. The relator, James S. Stone, alleges the following additional facts and claim:

105. The DOE orders applicable to Rockwell's management of Rocky Flats included 6430.1 and 6430.1A, entitled "General Design Criteria," 5483.1 and 5483.1A, entitled "Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Facilities," and 5480.1A, entitled "Environmental Protection, Safety and Health Protection For DOE Operations." These and other DOE Orders were intended, among other things, to ensure that the design and operation of Rocky Flats did not harm the plant employees, the public, or the environment, including by requiring that Rockwell comply with provisions of the Occupational Safety and Health Act ("OSHA").

106. The Rocky Flats' NPDES permit issued in 1981 was based on the condition that the sewage treatment plant ("STP") receive only domestic sanitary waste, cooling tower blowdown, and steam condensate. By the early 1980's, and possibly sooner, Rockwell learned that industrial wastes, in fact, also went to the STP, contrary to the permit.

107. Among other things, Rockwell did not disclose to the government that the "influent" disposed of into the STP contained hazardous wastes. This toxic influent to the STP also impaired the STP's performance. Moreover, as already discussed, effluent from the STP was spray irrigated, contrary to good engineering practices, causing run-off into public waterways.

108. As Rockwell ultimately admitted in the Plea Agreement and Statement of Factual Basis, Rockwell dumped in the STP such industrial wastes as beryllium dust, spent solvents, acetone, methylene chloride, 2-butanone, and wastes containing such toxic materials as cadmium, chromium and mercury. Rockwell pleaded guilty to violating NPDES permits by not reporting to the EPA, as required, all new, different, or increased discharges of pollutants and failing to prevent or minimize the potential for releasing significant amounts of toxic or hazardous substances from Rocky Flats to surface waters. Rockwell also pleaded guilty to violating NPDES permit conditions requiring it to

maintain the STP to achieve compliance with the permit terms and conditions.

109. Both during NPDES permit renewal negotiations over the course of the 1980's and in its Self-Analyses, Rockwell misrepresented to and concealed from the government the full extent of its knowledge about hazardous wastes disposed of in the STP in violation of NPDES permits. By so doing, Rockwell induced DOE to pay Rockwell higher award fees than DOE would have paid had DOE known the truth, and to continue the Rockwell contract.

110. Rockwell also committed serious health and safety transgressions relating to plutonium while it was manager of Rocky Flats, which were not adequately reported to the government, and which were in violation of, among other things, the above-described DOE orders.

111. Among other material misconduct relating to plutonium, Rockwell knowingly caused the accumulation of significant quantities of plutonium and other radioactive materials in building ducts throughout Rocky Flats. The problems associated with such uncontrolled accumulations are several-fold. First, enough plutonium in any one place in a certain configuration may cause a "criticality"--a rapid and uncontrolled release of radiation likely to cause fire, worker exposure and significant damage to safety systems intended to protect the public from plutonium exposure. Second, the presence in the ducts of what is considered one of the most toxic materials known to mankind poses a serious risk to maintenance workers and to workers stationed near the ducts, particularly if the ducts were to leak or rupture. And, the plutonium-contaminated ducts have consistently proved expensive and difficult to clean-up and otherwise remediate -- a particularly glaring problem now that Rocky Flats has ceased operations.

112. Malfunctioning and poorly-maintained "gloveboxes" were partially to blame for the plutonium accumulation. Gloveboxes are protective enclosures into

which workers place their hands when working on the processes involving plutonium, including fabrication of nuclear weapons components and processing plutonium materials. Intended to be under negative pressure, the gloveboxes are connected to the exhaust duct system with an intervening High Efficiency Particulate absorption ("HEPA") filter. The HEPA filter serves to prevent large amounts of plutonium dust from flowing from the gloveboxes into the duct system.

113. Rockwell did not properly maintain the gloveboxes and exhaust systems. For example, clogged HEPA filters were not replaced on an adequate basis. Rockwell exacerbated the maintenance problem by failing to comply with the DOE General Design Criteria Manual applicable to Rocky Flats at the time (DOE Orders 6430 and 6430.1), which required pre-filters in addition to, and ahead of, the HEPA filters, to reduce blockage. Workers were forced to poke holes in the clogged HEPA filters, or sometimes filters were removed altogether contrary to the DOE General Design Criteria Manual, to ensure negative pressure (air flow into the exhaust system and away from the workers). And, dump or release valves, which were supposed to open when negative pressure inside the glovebox fell and allow the air (and plutonium) to escape into the exhaust system, commonly remained partially or wholly open. With the missing, clogged and damaged filters and the open dump valves, plutonium dust flowed relatively unimpeded into the ducts at Rocky Flats. There was no routine, quantitative survey of plutonium accumulation in the duct work. Malfunctioning and poorly-maintained gloveboxes and related systems posed a hazard to workers as well, who depended on such protective devices for their safety.

114. The extent of the plutonium contamination in the ducts and the problems with the gloveboxes and related systems were in violation of contract terms numerous DOE Orders, including 6430, 6430.1, 5483.1, 5483.1A and 5480.1A.

115. The glovebox and exhaust system problems and the possibility of significant plutonium accumulation in the ducts at Rocky Flats were known to Rockwell during the time period that it was manager of Rocky Flats. Yet, Rockwell failed to disclose its knowledge to DOE or do anything about the plutonium-related problems while self-praising its criticality and nuclear safety programs in various Self-Analyses and other statements.

116. Even in 1989 when a comprehensive study of plutonium accumulation was launched, Rockwell misrepresented its knowledge of the problem. For example, in December 1989 discussions over award fees, Rockwell advised the government that the duct survey and study of necessary criticality program reforms conducted by outside consultants was aimed "at a new concern which had never been identified in 40 years [of DOE audits]." And Rockwell management falsely reported to the 1989 study team upon its initial visits that there was no evidence of plutonium accumulation in the ducts.

117. Had the United States been on notice during Rockwell's tenure of the facts regarding plutonium use and accumulation it later learned, it would not have allowed Rockwell to remain as contractor. At the very least, Rockwell's endangerment of its workers and the public by exposure to plutonium, if known to the United States earlier, would not have justified the substantial award fees Rockwell received for years. The government was also damaged by having valuable materials which belong to the government lost or rendered unrecoverable by Rockwell's misconduct.

118. Rockwell's beryllium machining shop in Building 444, in which the toxic metal was used to make weapons components, provides another example of Rockwell's lax attention to worker health that went substantially unreported to the Government.

119. After DOE became aware in 1984 of a case of the severe lung disease berylliosis (caused by beryllium

exposure) in a former Rocky Flats worker - the first of many diagnosed to date -it ordered Rockwell to investigate health conditions in the machine shop. The team appointed to head this investigation found extensive beryllium contamination throughout the shop, poor industrial hygiene practices (including workers not wearing respirators), a monitoring program that drastically undermeasured workers' exposure and an inadequate ventilation system. Levels of beryllium exposure in the shop were improperly above the OSHA standard. An independent consulting firm, OccuSafe Inc., verified these problems. Over the next several years, Rockwell, in conjunction with OccuSafe, was supposed to fix each of these problems.

120. Rockwell knew of the dangerous conditions in the beryllium machine shop prior to 1984, and made misrepresentations to DOE thereafter relating to such conditions or the correction of same. Such misrepresentations caused DOE to award higher award fees than it would have otherwise paid and to continue to renew Rockwell's contract at Rocky Flats.

**COUNT SIX**

(False Claims Act: 31 U.S.C. § 3729(a)(1))

121. This is a claim by relator Stone for treble damages and civil penalties under the False Claims Act, 31 U.S.C. § 3729(a)(1) for Rockwell's knowingly presenting or causing to be presented to the Government false or fraudulent claims for money or property.

122. Plaintiff Stone incorporates by reference herein the allegations made above in paragraphs 1 through 82, and 104 through 120, inclusive.

123. By virtue of the acts described above, Rockwell knowingly presented, or caused to be presented, to the government false or fraudulent claims for money or property, and used false and fraudulent statements to get claims paid and approved by the government. By reason of Rockwell's violations, relator alleges the United States has been damaged in an amount to be proven at trial in excess of

$50 million.

## PRAYER

WHEREFORE, plaintiff United States and relator Stone pray for judgment against the defendants, jointly and severally, as follows:

A. On Count I, under the False Claims Act, for treble the damages sustained by the United States, which also include investigative costs, and which will be proven at trial, plus civil penalties as are allowable by law in the amount of $5,000 to $10,000 per violation, post judgment interest, and attorneys fees and costs;

Plaintiff United States prays for judgment against defendants, jointly and severally, as follows:

B. On Count II, common law fraud, judgment against defendant for the damages sustained by the United States which will be proven at trial, and for pre judgment and post-judgment interest, and costs;

C. On Count III, breach of contract, against defendants in the amount equal to the damages suffered by the United States, plus pre judgment and post judgment interest, and costs;

D. On Count IV, payment under mistake, for the sums mistakenly paid by the United States, which will be proven at trial, and for pre judgment and post judgment interest, and costs;

E. On Count V, unjust enrichment, for the sums by which Rockwell has been unjustly enriched, which will be proven at trial. plus pre judgment and post-judgment interest, and costs;

Plaintiff Stone prays for judgment against defendants, jointly and severally, as follows:

F. On Count VI, under the False Claims Act, for treble the damages sustained by the United States, which also include investigative costs, and which will be proven at trial, plus civil penalties as are allowable by law in the amount of $5,000 to $10,000 per violation, post judgment interest, and attorneys' fees and costs; and

Plaintiffs United States and Stone pray for:

G. Such other relief as this Court may deem just and proper, together with interest and costs.

As to Counts I through V:

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Assistant Attorney General

HENRY L. SOLANO
United States Attorney

LINDA A. SURBAUGH
Assistant United States Attorney

/s/ John A. Kolar
MICHAEL F. HERTZ
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Attorney for James S. Stone

Dated: December 20, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-M-1154

UNITED STATES OF AMERICA
*ex rel.* James S. Stone,

Plaintiff,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

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**ANSWER TO AMENDED COMPLAINT**

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* * *

10. The claims asserted by Mr. Stone in the Amended Complaint are barred under 31 U.S.C. § 3730(e)(4) because they are based upon publicly available information and Mr. Stone is not the "original source" of such information.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel. JAMES S. STONE, | ) | |
| Plaintiff, | ) | 89 M 1154 |
| vs. | ) | |
| ROCKWELL INTERNATIONAL CORPORATION, | ) | |
| Defendant. | ) | |

PRELIMINARY PRETRIAL CONFERENCE
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, a U.S. District Judge for the District of Colorado, beginning at 2:00 p.m. on the 26th day of September, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

MR. KOENIGS: And I believe a case in some circuit down south has ruled that you still have to do an original source analysis, even if the government intervenes, to determine whether or not the qui tam plaintiff is allowed to recover attorney's fees.

THE COURT: But that's secondary to the trial anyway.

MR. KOENIGS: It surely is.

THE COURT: I mean, that would be an issue that I would deal with if there's a verdict in favor of the plaintiffs.

* * *

THE COURT: Okay. And then you also have some matters here relating to the part of this case, and Mr. Stone's participation, but I'm not sure how significant that is now with the government having joined, I mean, except for this one claim in which the government has not joined, and which we do have to worry about how we're going to deal with that, as discussed before. Apart from that, though, what real difference does it make? The government's here, and I don't-you know, you've even got a challenge to the constitutionality of the statute.

MR. KOENIGS: Right. The statute is still fully applicable, but as you have pointed out, only as to this remaining unadopted claim, which is plutonium in the ducts. And also, Your Honor, my understanding of the law is that there's a case holding that not withstanding if the government intervenes, there's a statutory provision which allows a plaintiff to recover attorney's fees.

# United States District Court

DISTRICT OF COLORADO

| In the Matter of the Search of<br>* * * | |
|---|---|
| The Rocky Flats Plant<br>U.S. Department of Energy<br>Rockwell International Corporation<br>Highway 93<br>Golden, Colorado 80402 | APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT<br><br>CASE NUMBER |

I Jon S. Lipsky being duly sworn depose and say:

* * *

8.12. During 1988, Pond 207A was being drained and Building 778 was being used to mix the wastes from Pond 207A with concrete to form "pond crete." However, due to an inadequate waste-concrete mixture, some of the blocks disintegrated and the clean-up of the 207 solar ponds was, and remains halted. Since clean-up activities have allegedly ceased, Ponds 207A, 207B and 207C should not be in use. As of November 8, 1988, RCRA's interim status regulations also require all surface impoundments to have two or more liners and a leachate collection system in order to continue receiving hazardous wastes. See 40 C.F.R. 265.221. Solar Ponds 207A, 207B and 207C do not have the required liners or leachate collection system.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
*ex rel.* JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION, THE BOEING CORP., and BOEING NORTH AMERICAN, INC.

Defendant.

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## SCHEDULING ORDER

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* * *

(c) Joint meetings with clients regarding settlement.

Subsequent to Government intervention, no settlement discussions have occurred, and no meetings have been scheduled.

VII. Discovery Limitations, Deadlines and Scheduling:

A. Fact Discovery Limitations and Deadlines:

1. Depositions. The parties agree that the cutoff date for fact depositions shall be March 19, 1998. The parties agree that each side shall be permitted to take up to 45 post-government intervention depositions without leave of court. The parties

state that while they intend to make every effort to remain within this deposition limit, it may be possible that despite best efforts some additional depositions may be necessary. In such instance, they would seek leave of court.

2. Interrogatories. The parties agree that the cutoff date for serving interrogatories shall be February 15, 1998. The parties also agree that each side be limited to 25 post-government intervention interrogatories, including subparts. The Government has withdrawn all but 18 post-government intervention interrogatories served in this action, to which defendants agree to answer on or before December 30, 1997. With regard to the 7 remainig available interrogatories, the Government will be responsible for serving any such additional interrogatories onn behalf of plaintiffs. Defendants agree to answer any such interrogatories on or before 30 days after service. Defendants have withdrawn all but 4 post-government intervention interrogatories served in this action, and has 21 remaining available interrogatories. The Government agrees to answer any such interrogatories on or before 30 days after service.

3. Admissions. The parties agree that each side shall be limited to 250 requests for admissions, including subparts, without leave of court. The cutoff date for service of admissions shall be M arch 19, 1998.

4. Documents The cutoff for service of document requests shall be March 19, 1998.

B. Expert Discovery Limitations and Deadlines:

1. Expert Designation. The parties shall simultaneously designate experts and prove

opposing counsel with the information identified in Rule 26(a)(2) on or before February 9, 1998.

2. Rebuttal Experts. The parties shall simultaneously designate any rebuttal experts and provide opposing counsel with the information identified in Rule 26(a0(2) on or before March 30, 1998.

3. Deposition of Experts. Depositions of experts may begin on or after February 19, 1998, and the cutoff date for depositions of experts shall be April 30, 1998.

C. Other Discovery Deadlines:

1. Exchange of Final Wtinesses and Exhibits. Final lists of witnesses and exhibits under Rule 26(a)(3) are due April 9, 1998. The parties shall file their respective objections to the lists of witnesses and exhibits under Rule 26(a)(3) on or before April 30, 1998.

2. Dispositive Motions. Leave of court must be requested to file any motion for summary judgment. The deadline for filing any motion for summary judgment motion is April 9, 1998.

D. Proposed Trial Date.

The parties request that the Court consider scheduling trial in early June 1998.

VII. Other Matters Warranting the Court's Attention:

Defendants state that the following additional issues or matters await the Court's decision:

On March 17, 1997, defendants filed a Motion for Partial Summary Judgment seeking judgment as a matter of law on two of plaintiff United States' five claims for relief—those alleging unjust enrichment and payment by mistake of fact. On April 9, 1997, plaintiff United States filed its response to defendants' motion, and on May 29, 1997, defendants filed a reply brief on the motion.

WITH RESPECT TO DISCOVERY DISPUTES, PARTIES MUST COMPLY WITH D.C. COLO. L. 7.1. PARTIES OPPOSING A DISCOVERY MOTION SHALL HAVE 11 DAYS IN WHICH TO FILE A RESPONSIVE BRIEF. NO REPLY BRIEFS WILL BE ACCEPTED WITHOUT LEAVE OF COURT. DISCOVERY MOTIONS OR BRIEFS RELATING THERETO SHALL NOT EXCEED 10 PAGES IN LENGTH.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendant.

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## STIPULATION

---

Plaintiffs United States of America and James S. Stone, and defendants Rockwell International Corporation and Boeing North American, Inc. (collectively, the "parties"), by and through their attorneys, agree as follows:

1. The parties shall not introduce evidence, comment or otherwise make arguments concerning Mr. Stone's status as relator or right to relief in this case except as set forth in the Juror Questionnaire provided to the parties by the Court at the conference held on February 4, 1998.

2. Any proposed jury instructions that conflict with the above are hereby withdrawn.

3. Nothing in this Stipulation shall affect the rights or arguments of any party as to Mr. Stone's entitlement to relief as a result of any verdict for the plaintiffs in this case.

Dated: February 17, 1998

Respectfully submitted,
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[CLERK, U.S. DISTRICT COURT]
[DISTRICT OF COLORADO]
[FILED]
[9/21/98]
[JAMES R. MANSPEAKER, CLERK]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* James S. Stone, and UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CO., *et al.*,

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW SUPPORTING THEIR PROPOSED JURY INSTRUCTIONS RELATING TO FALSE CLAIMS ACT ELEMENTS OF LIABILITY AND DAMAGES

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consolidated and expanded version of those instructions should be provided to the jury *before* any evidence is presented.

A preliminary instruction is particularly appropriate in this case, because Mr. Stone is not included on plaintiffs' trial witness list and plaintiffs' counsel have confirmed in writing that he will not be called to testify at trial. Thus, the best method for explaining to the jury the parties to the litigation as well as Mr. Stone's involvement will be through a factual instruction at the beginning of trial. Attached hereto as Exhibit A is Rockwell's proposed preliminary jury instruction, which is based in part upon Judge Carrigan's August 8, 1991 Order (copy attached as Ex. B) dismissing on collateral estoppel grounds Mr. Stone's claim against Rockwell alleging retaliation for whistle-blowing under the FCA.

B. **The 1986 FCA Amendments May Require Two Versions of FCA Instructions.**

The FCA was substantially amended by Congress in October 1986. The more significant substantive changes included: (1) lowering the level of defendant's knowledge required to establish a violation, 31 U.S.C. § 3729(b);[21] (2) lowering the plaintiff's burden of proof from clear and convincing (see *United States v. Ueber*, 299 F.2d 310, 314-15 (6th Cir. 1962)) to a preponderance of the evidence, 31 U.S.C. § 3731(c); (3) increasing the civil penalty from $2,000 to between $5,000 and $10,000 per "claim," *id.* § 3729(a); (4) providing for treble rather than double actual, non-consequential damages, *id.*; and (5) permitting a prevailing *qui tam* plaintiff to recover attorney fees even if the government intervenes. *Id.* § 3730(d)(1).

None of substantives changes to the FCA – including

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[21] Under the pre-1986 FCA, a finding of "actual knowledge" was required in the Tenth Circuit to impose liability. *United States v. Fleming*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965). As amended, either deliberate ignorance or reckless disregard of the truth is now sufficient to satisfy the scienter requirement.

those set forth above – can be applied retroactively to conduct that occurred in this case before the amendments were made effective on October 27, 1986. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1876-79 (1997). *See, e.g., United States v. TDC Management Corp.*, 24 F.3d 292, 298 (D.C. Cir. 1994) (treble damages and civil penalty increases permitted by the amended FCA cannot be applied retroactively); *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991) (the amended FCA's expansion of the scienter requirement beyond "actual knowledge" cannot be applied retroactively).

Despite repeated requests by Rockwell and their obligation to do so under Fed. R. Civ. P 26(a)(1)(C), plaintiffs have never firmly identified the specific "claims" for which they will contend at trial that Rockwell is liable for a civil penalty under the FCA. Plaintiffs initially asserted that "[w]e estimate that a civil penalty should be assessed for each six month award fee period within the time period of 10/01/86 to 09/30/89, and for each statement and concealment detailed in the government's response to Rockwell's Interrogatory No. 38 in the Court of Federal Claims case." *See* Plaintiff United States' Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1) served on January 15, 1997, at 7 (excerpts attached as Ex. C).

Apparently recognizing that there were hundreds of alleged false statements and concealments contained in the government's 81-page response to Rockwell's Interrogatory No. 38 in the Court of Federal Claims case, plaintiffs modified their position on the availability of penalties in an amended filing served in this case on September 25, 1997: "We estimate that Rockwell is potentially eligible for a civil penalty for each affected award fee period, and for each request for payment or draw down on the letter of credit relating to any of the sums paid to Rockwell in the above damage calculations." See Plaintiff United States' First

Amendment to Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1), at 5-6 (excerpts attached as Ex. D).[22] The "damage calculations" referenced by plaintiffs in the "First Amendment to Disclosures" related to award fees starting with the six-month period ending March 31, 1987 and to pondcrete/saltcrete operations costs between "1987 and 1989." *Id.* at 3-4. Thus, only post-amendment FCA damages were asserted in the "First Amendment to Disclosures."

Notably, plaintiffs have not tendered any pre-FCA amendment jury instructions. Based on this fact, as well as plaintiffs' disclosures discussed above, Rockwell currently believes that all of the disputed conduct for which plaintiffs seek to hold Rockwell liable occurred *after* the October 27, 1986 effective date of the FCA amendments. Accordingly, Rockwell has not tendered proposed jury instructions relating to the pre-amendment version of the FCA.

If plaintiffs intend to seek damages for conduct prior to October 27, 1986, it will be necessary for the jury to receive a second version of instructions relating to the pre-amendment FCA. In order for the Court (and Rockwell) to determine whether pre-amendment FCA instructions will be needed, Rockwell respectfully requests that the Court direct plaintiffs to file promptly an itemization of the specific "claims" for which they will *actually* seek at trial to impose liability for civil penalties under the FCA.

Are plaintiffs seeking civil penalties only for (1) specified award fee periods, and (2) specific requests for payment or draw downs on the letter of credit relating to sums paid by the government relating to pondcrete/saltcrete production? If so, for which specific six-month award fee periods, and

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[22] Rockwell paid expenses for operating the Rocky Flats plant directly out of a government-owned checking account, which was funded by a government letter of credit.

which specific requests for payment or draw downs on the letter of credit, are plaintiffs seeking civil penalties? If not, for what other claims will plaintiffs actually seek to recover civil penalties at trial? To be useful, plaintiffs' itemization must include (1) a designation of each "claim" for which plaintiffs will seek to hold Rockwell liable for civil penalties, and (2) a description of the evidence (by reference to trial exhibit numbers) documenting the making of each alleged "claim" by Rockwell. Such an itemization should have been provided by plaintiffs months ago; it is now crucial that the itemization be made promptly for purposes of determining the need for pre-amendment FCA jury instructions.

C. General Elements of Liability Under the FCA.

Plaintiffs have asserted claims under Subsections (a)(1) and (a)(2) of the FCA. *See* 31 U.S.C. § 3729(a)(1)-(2). In order to establish a violation of Subsection (a)(1), plaintiffs bear the burden of proving that Rockwell submitted to the government a claim for payment that was knowingly false or fraudulent in some material respect. *See* Def. Instr. 12. To show liability under Subsection (a)(2), the Tenth Circuit recently stated that:

> [A] [plaintiff] must demonstrate (1) a 'claim' was presented to the government by the defendant . . . (2) the claim was 'false or fraudulent,' (3) the defendant presented the claim knowing it was `false or fraudulent," and (4) the defendant made or used a false statement which the defendant knew to be false, and which was *casually connected to the false claim.*"

*United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) (emphasis added). *See also United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 986 (E.D. Wis. 1998) (Subsection (a)(2) "must involve the

production or use of a false statement or record *on behalf of a false claim*" for liability to be imposed) (emphasis supplied by the court); *BMY-Combat Sys. v. United States*, 38 Fed. Cl. 109, 126 (1997) (liability under

* * *

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel., | ) | |
| Plaintiff, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendant. | ) | |

STATUS CONFERENCE
TRANSCRIPT OF PROCEEDINGS

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES: (Continued)

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* * *

* * *

[44] your indulgence. I have two questions, though, one is what years, and this is important for the jury instructions because there was a change in the FCA in 1986. So if Mr. Kolar could address what years these claims are for? And, secondly, I just want to make sure that there are no other claims than these monthly and annual--possibly monthly, certainly annual, that might be asserted as claims under the FCA, if I may, Your Honor, the questions we've been asking for a long time.

MR. KOLAR: Let me address the second question first, because I guess the way--the meaning of a claim is one of the issues we do address in the jury instruction briefs, and I think we have a disagreement with them over the interpretation or understanding of the first prong under the statute, Subsection 3729(a)(1), that says --

THE COURT: Well, this is why we're doing jury instructions early.

MR. KOLAR: Right. I think it's --

THE COURT: What is this amendment?

MR. KOLAR: All right, I'll address the first issue first.

THE COURT: Yeah.

MR. KOLAR: The amendment was the change to the False Claims Act in October of 1986, which among other things, changed the scienter standard. It standardized, if you will, [45] the scienter standard all over the country. Up

until that time, there were disparate circuit court decisions, and Congress came in and said knowing means actual knowledge, deliberate ignorance, reckless disregard. That was one of the changes. Congress specifically stated that specific intent to defraud was not required. So there was --

THE COURT: What had the Tenth Circuit said before that amendment?

MR. KOLAR: The Tenth Circuit had said in a case called Fleminct versus United States, that it was actually knowledge of falsity. The problem with it was that courts in—and I don't think the court addressed it beyond that. And courts in other circuits in the country by that point in time had interpreted what actual knowledge of falsity --

THE COURT: Well, we're going to apply Tenth Circuit law, aren't we?

MR. KOLAR: Absolutely.

THE COURT: Okay.

MR. KOLAR: But I'm just saying there was a great deal of confusion I would say in the case law.

THE COURT: Well, now, do we have in this case some pre-amendment and some post-amendment?

MR. KOLAR: We are not going to argue that costs prior to the change in the statute are false costs in this case. I don't think that -- the change in the statute was in -- took [46] effect in October of 1986.

THE COURT: Okay.

MR. KOLAR: The timing of when we say the false conduct and fraudulent conduct in regard to pondcrete started was in early '87.

THE COURT: So the '86 act is the one --

MR. KOLAR: So the '86 act, in my view, does not apply.

THE COURT: Does not apply?

MR. KOLAR: I'm sorry, I misspoke.

THE COURT: Does apply.

MR. KOLAR: It's been a long day. I misspoke. It does apply.

THE COURT: Yes.

MR. KOLAR: The pre-1986 act does not apply.

THE COURT: Does not. Okay, so we're working with the standards established by Congress in the 1986 act.

MR. KOLAR: That's correct.

THE COURT: That helps.

MR. KOENIGS: That does help. And then the last issue of whether there are any other claims as to which the government will seek these fairly substantial penalties, other than the annual and possibly monthly vouchers.

MR. KOLAR: The issue -- the other thing that we think is subject to penalties in the statute is false statements. This gets into the difference between A(1) and A(2) in 3729,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING -
NORTH AMERICAN, INC.

Defendant.

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**MR. STONE'S RESPONSE TO DEFENDANTS' MEMORANDUM ON PROPOSED JURY INSTRUCTIONS PERTAINING TO MR. STONE'S ROLE AS RELATOR**

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Pursuant to the discussions at the September 25, 1998 status conference, plaintiff James S. Stone, relator, by his counsel, respectfully submits this response to defendants' discussion regarding Mr. Stone's role as relator in "Defendants' Memorandum of Law Supporting Their Proposed Jury Instructions Relating to False Claims Act Elements of Liability and Damages," dated September 21, 1998.

**Preliminary Statement**

On September 21, 1998, the parties submitted to the Court their respective memoranda of law on the proposed jury instructions on the False Claims Act. In its memorandum, Rockwell also raised two issues relating to Mr. Stone's status as relator in this case. First, Rockwell argues that what it calls "the *qui tam* jurisdictional defense" -- which was rejected by the Court in February 1994 --

should be revisited after trial in the event plaintiffs prevail. And second, Rockwell suggests that this Court should instruct the jury regarding (i) Mr. Stone's state court wrongful discharge case and (ii) the statutory provisions relating to Mr. Stone's percentage share of the recovery in this case.

As to the first, Mr. Stone agrees with Rockwell that any issues Rockwell might seek to raise regarding the so-called "*qui tam* jurisdictional defense" (and we believe there are none) should be deferred until after trial. As we explain below, the Court's subject matter jurisdiction has been resolved by two prior rulings of the Court -- the first when it denied Rockwell's motion to dismiss on "original source" grounds prior to government intervention, and the second when it granted the government's motion to intervene in the case. Thus, this Court plainly has jurisdiction over this case and the "original source" provision simply is not now in the case. In any event, because no triable issues are presented by Rockwell's so-called jurisdictional defense, this topic should be addressed, if at all, following trial, which is precisely what the parties had agreed prior to the July 6 trial date.

Furthermore, Rockwell's proposed jury instructions relating to Mr. Stone's role as relator clearly are inappropriate, because they have nothing whatsoever to do with any of the issues that the jury will need to decide in this case. Specifically, Rockwell's proposed "Preliminary Instruction [No. 1-A] Regarding the Parties and Stone's Role as a Relator" obviously seeks to prejudice the jury against rendering a large damages verdict by informing the jury that Mr. Stone, by statute, may receive up to 25 % of the recovery. However, the jury should not be permitted to consider the manner by which any verdict it renders will be divided among the plaintiffs (as that division is outside its province), but rather must decide the actual amount of damages that resulted from Rockwell's false claims. Put another way, because Rockwell will be liable for the full

judgment no matter how much of it Mr. Stone receives, there simply is no issue for the jury to decide on the topic and thus instructing the jury on what the FCA statute provides is clearly inappropriate.

Likewise, Rockwell's attempt to inform the jury that Mr. Stone's retaliation claim was dismissed by this Court -- on the basis of collateral estoppel due to the dismissal of his state court action that rested on the at-will employment doctrine of Colorado law (which has nothing to do with this case) -- is another attempt improperly to prejudice the jury against plaintiffs on an issue that does not go to the merits of the-claims that will be submitted to the jury in this case. Indeed, if Rockwell were entitled to the instruction it seeks (and it is not), then plaintiffs are entitled to have the jury told that (i) the Court found Mr. Stone to be an original source and accordingly denied Rockwell's motion to dismiss on that ground and (ii) the fact that the government intervened in this case demonstrates even the more its meritworthiness.

In short, the jury's role is to decide the factual issues relating to plaintiffs' claims and Rockwell's defenses, and not any issues relating to how the damages are divided by statute between the plaintiffs. Toward that end, the Court may explain Mr. Stone's role in the case as relator without (as Rockwell seeks) prejudicing the jury to award a lesser amount of damages to plaintiffs.

**Statement of Facts**

In November 1992, Rockwell deposed Mr. Stone over the course of four days. Relying on that testimony, on December 12, 1992, Rockwell filed a motion to dismiss this action for lack of subject matter jurisdiction, arguing that the allegations in this case were based on publicly disclosed information and contending that Mr. Stone was not an "original source" of that information. The parties briefed this issue extensively and, following oral argument, on February 2, 1994, Judge Carrigan denied Rockwell's motion, in a written opinion in which the Court found that Mr. Stone

was an original source of the information upon which the allegations in this action are based and that this Court accordingly had jurisdiction over the action. Specifically, Judge Carrigan ruled:

> [T]here is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments... .
>
> As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the information on which the allegations [of this action] are based....

Opinion at 4-5. Upon Rockwell's request, Judge Carrigan certified this ruling for interlocutory appeal to the Tenth Circuit. On November 16, 1994, the Tenth Circuit declined to hear the appeal, and this action has proceeded through today without Rockwell ever again seeking reconsideration of Judge Carrigan's findings.

Over a year after the Tenth Circuit rejected Rockwell's appeal, on November 14, 1995, the United States moved to intervene in this case pursuant to 31 U.S.C. § 3730(c)(3) on the basis of information provided by Mr. Stone in this action, as well as information obtained by the government in its (now stayed) litigation with Rockwell in the Court of Federal Claims. This Court granted the government's motion to intervene on November 19, 1996. United States ex rel. Stone v. Rockwell Int'l Corp., 950 F. Supp. 1046, 1049 (D. Colo. 1996). At the same time, this Court denied Rockwell's motion "to enforce" the plea agreement by which Rockwell had sought to prevent the United States from intervening on the asserted ground that such intervention violated Rockwell's criminal plea agreement. In a direct appeal taken by Rockwell in the criminal case, the Tenth Circuit affirmed this Court's decision on government intervention. United States v. Rockwell Int'l Corp., 124

F.3d 1194, 1201 (10th Cir. 1997). In light of these rulings, there can be no question that this Court has subject matter jurisdiction over this action.

In April 1998 -- for ~~the first time~~ since November 1992 -- Rockwell requested an additional deposition of Mr. Stone. Because Rockwell had deposed Mr. Stone for four full days already, and because Rockwell also was beyond its 45-deposition limit, Mr. Stone objected to this deposition absent Rockwell demonstrating a compelling reason for the deposition. In response, Rockwell stated ~~that~~ the purpose of this deposition was to obtain information relating to Mr. Stone's status as an "original source" of the allegations in this case -- the same subject about which Mr. Stone had been deposed for four days. While Mr. Stone took the position (which we reiterate here) that the original source issue was fully disposed of by Judge Carrigan's decision, counsel for Mr. Stone and Rockwell agreed that the original source provision was not an issue to be litigated at the trial of this action and should be addressed, if at all, after the conclusion of the trial. Thus, in accordance with this agreement, plaintiffs did not submit any jury instructions on the subject nor did we discuss it in our corresponding memorandum of law.[1]

## Discussion

### I.
### THE ASSERTED *QUI TAM* "JURISDICTIONAL" DEFENSE

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[1] Communications between counsel for Rockwell and counsel for Mr. Stone on the original source provision and the deposition of Mr. Stone, including the agreement to defer this matter until after trial, are documented in a series of correspondence exchanged by counsel. Pursuant to the Court's prior instruction, we have not attached copies of this correspondence but will make them available upon the Court's request.

A. The "Original Source" Provision Has Been Decided and Is Not An Issue For Trial

The False Claims Act grants this Court subject matter jurisdiction over actions that are based upon the public disclosure of allegations or transactions if (1) the person bringing the action is an original source of the information, or (2) the suit is brought by the government. 31 U.S.C. § 3730(e)(4)(A). In this case, both of these alternatives have been satisfied by court order.

First, in December 1992, Rockwell sought to dismiss this action under § 3730(e)(4)(A) on the asserted ground that Mr. Stone was not an original source of the information upon which this action is based. Following extensive briefing and argument, Judge Carrigan rejected Rockwell's argument, and properly asserted jurisdiction over this action by finding that Mr. Stone was an original source of the information upon which this action is based. Opinion at 3-5. See also United States ex rel. Durcholz v. FKW Inc., 997 F. Supp. 1159, 1164-67 (S.D. Ind. 1998) (finding relator to be original source on motion to dismiss, court asserted jurisdiction over FCA action); United States ex rel. Long v. SCS Bus. & Technical Inst., 999 F. Supp. 78, 86-89 (D.C. 1998) (same).

The Court also properly asserted subject matter jurisdiction under the FCA through, and by virtue of, the government's intervention in this case in November 1996. See United States ex rel. Stone v. Rockwell Int'l Corp., 950 F. Supp. 1046, 1049 (D. Colo. 1996) (permitting government to intervene as a party-plaintiff in this-case). Indeed, any argument that Rockwell might have had regarding the Court's jurisdiction over this action following Judge Carrigan's decision on original source has been mooted by the government's intervention. See United States ex rel. Merena v. Smithkline Beecham Corp., Nos. Civ.A. 93-5974, Civ.A. 95-6953, Civ.A. 95-6551, 1998 WL 166256 at *15 E.D.

Pa. Apr. 8, 1998) (holding that government intervention moots any subject matter jurisdiction question); see also County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (matter is moot when issues presented are no longer live or the parties lack a legally cognizable interest in the outcome); Phelps v. Hamilton, 122 F.3d 1309, 1325-26 (10th Cir. 1997) (prior court decision finding statute unconstitutional moots current challenge to application of the statute); Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727-29 (10th Cir. 1997) (where relief sought by plaintiff has been provided, claim was moot).

Because jurisdiction has been established (twice), there is no issue relating to the original source provision requiring disposition at trial. Any argument that Rockwell might raise with this provision (and we believe there is none) should be made after the trial of this action. In fact, while we dispute that there is any remaining issue to be decided at all, Rockwell at least agrees that application of this provision is "for the Court -- not a jury -- to decide." Rockwell Mem. at 31; see also United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551 n.1 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993).

Thus, Mr. Stone submits that there are no viable issues concerning subject matter jurisdiction or the original source provision. In any event, if any such issues may still be raised by Rockwell, they should be addressed following the conclusion of trial, consistently with the agreement previously reached by the parties.

## II.

## ROCKWELL'S PROPOSED PRELIMINARY JURY INSTRUCTION NO. 1-A SHOULD BE REJECTED

Rockwell's proposed preliminary instruction regarding the role of Mr. Stone as relator should be rejected because it is irrelevant to the issues that the jury is to decide and plainly is designed to unfairly prejudice the jury against plaintiffs.

While plaintiffs do not dispute the usefulness of

preliminary instructions to introduce the jury to the parties in this case (and we have proposed a few of our own), Rockwell's proposal goes too far. It reads as follows, with the offensive language italicized:

> I will instruct you at the conclusion of the evidence on the elements that the plaintiffs, or the United States, must prove under each claim. For now, you should know that the False Claims Act allows a private citizen, known as a "Relator," to bring an action on behalf of the United States government against any person or entity who is alleged to have knowingly submitted a false or fraudulent claim for payment to the government.
>
> In this case, the Relator is Mr. Stone, who was employed by defendant from November 10, 1980 until March 17, 1986. Mr. Stone filed this lawsuit in July 1989 alleging claims for violation of the False Claim [sic] Act *and for retaliation for whistle-blowing against defendant. Mr. Stone's retaliation claim was dismissed by Order of this Court dated August 8, 1991 because that claim had been decided against Mr. Stone in a separate state court action that found his discharge by defendant in March 1986 to have been as a result of a reduction in force.* The government subsequently intervened in this case and joined Mr. Stone in his claim under the False Claims Act relating to pondcrete, saltcrete and spray irrigation.
>
> *If a False Claims Act violation is proven in this case, the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government.*

First, Mr. Stone's state court action -- and the dismissal of his retaliation claim on collateral estoppel grounds -- is

entirely irrelevant to the claims to be decided by the jury in this case. By way of background, Mr. Stone had filed a state court action relating to Rockwell's termination of Mr. Stone's employment. That case was decided against Mr. Stone on the grounds that under Colorado law his employment was at will and therefore terminable at any time, and that he was laid off due to a reduction of force. Based on that finding, Judge Carrigan granted Rockwell's motion to dismiss Mr. Stone's retaliation claim in his complaint in this Court, without making any new findings. See United States ex rel. Stone v. Rockwell Int'l Corp., No 89-C-1154 (Aug. 3, 1991). Because these issues have nothing to do with the FCA claims to be presented to this jury on Rockwell's conduct, there is no reason to instruct the jury about them.

Moreover, Rockwell's proposed instruction is completely one-sided. While Rockwell seeks to discuss Mr. Stone's state court action -- apparently to have the jury conclude (illogically) that his FCA claims lack merit -- Rockwell omits any mention of certain motions decided in this case which plaintiffs would argue demonstrate the merits of their claims -- including the denial of Rockwell's motion to dismiss the case on original source grounds and the Court's grant of the government's motion to intervene in Mr. Stone's suit. Rockwell cannot have it both ways.

Second, Rockwell's statement That "the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government" also must be rejected because such an instruction clearly is intended to prejudice and inflame the jury against plaintiffs. If the jury were told that Mr. Stone may receive 25% of the damages awarded in this case, the jury inappropriately may conclude that Congress was wrong in setting that percentage and might adjust its damages verdict as a result. Just as juries are not told about other statutory provisions that are enacted by Congress for other public policy reasons -- such as trebling, civil penalties and

recovery of attorneys' fees -- the jury should not be told about the relator's share provision of the FCA.. See, e.g., HBE Leasing Corp. v. Frank, 22 F.3d 41, 46-47 (2d Cir. 1994) (district court properly precluded "defendants' counsel from parading RICO's treble damages and attorney's fees provisions before the jury"); Standard Indus., Inc. v. Mobil Oil Corp., 475 F.2d 220, 223 (10th Cir.) ("matters of trebling, costs and attorney's fees were 'no part of the jury's function'"), cert. denied, 414 U.S. 829 (1973).

The bottom line is that the jury's role is to decide what the actual damages are without considering how much Rockwell in fact must pay at the end of the day and how much the government and Mr. Stone each will receive. Thus, submission of instructions or evidence to the jury on the relator's share provision (as Rockwell proposes) would only confuse deliberations regarding those areas directly within the jury's purview: Rockwell's liability and the amount of damages recoverable by plaintiffs under the FCA.

## Conclusion

For the foregoing reasons, Rockwell's proposed jury instruction No. 1-A should be rejected to the extent it discusses Mr. Stone's share of the recovery and his retaliation and wrongful discharge claims. In addition, Mr. Stone submits that Rockwell should not be permitted to relitigate the "original source" issue but, in any event, the Court should rule that any such relitigation should be deferred until after trial.

Dated: October 8, 1998

Respectfully submitted,

PAUL, WEISS, RIFKIND,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
*ex rel.* JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendant.

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## FINAL PRETRIAL ORDER

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**I. Date and Appearances**

A pretrial conference in the above case was held on January 28, 1999.

Appearing for the parties were:

John A. Kolar, Esq.
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Counsel for the United States of America

* * *

B. Defenses of Defendants:

Defendants deny the allegations set forth in plaintiffs' statement of claims, and states that it fairly disclosed to

DOE, EPA, DOJ, and other government agencies all material problems at the Rocky Flats Plant involving environmental, health and safety matters. In addition, defendants assert that: (1) plaintiffs' claims are barred in whole or in part by the applicable statutes of limitations; (2) plaintiffs' claims are barred in whole or in part by the doctrines of waiver, estoppel and laches; (3) the damages sought by plaintiffs are barred because the United States failed to mitigate its damages, if any; (4) plaintiffs' claims are barred because facts relating to the allegations of fraud set forth therein were the subject of independent investigation, evaluation, acquiescence and/or approval by the United States; (5) the claims asserted by the United States are barred by a release and covenant not to sue by the United States; (6) the claims asserted by the United States are barred because they are brought in breach of promises and representations that the United States made to Rockwell in order to induce Rockwell's guilty plea in the criminal action captioned United States of America v. Rockwell International Corporation, Case No. 92-CR-107 (D. Colo.); (7) the claim asserted by the United States for breach of contract is barred, in whole or in part, because Rockwell's performance was (a) rendered impracticable; (b) rendered impossible; (c) prevented or substantially interfered with by the government; and/or (d) induced by the government; (8) the claims asserted by the United States for payment by mistake of fact and unjust enrichment are barred because the relevant relationship between Rockwell and the United States was governed by a contract or contracts; (9) the claims asserted by Mr. Stone are barred under 31 U.S.C. § 3730(e)(4) because they are based upon publicly available information and Mr. Stone is not the "original source" of such information; (10) the claims asserted by Mr. Stone are barred because they are based on evidence or information which the United States had in its

possession at the time this action was commenced; (11) the claims asserted by Mr. Stone are barred because the *qui tam* provisions of the False Claims Act as amended violate several provisions of the United States Constitution, including the separation of powers doctrine, the appointments clause of Article II, section 2, and the case or controversy requirement of Article III; (12) any judgment against defendants should be diminished, in whole or in part, to an amount which represents defendants' assigned degree of negligence, fault or responsibility (if any) pursuant to C.R.S. § 13-21-111.5, or other applicable law; and (13) the claims asserted by Mr. Stone in Count 6 are barred, in the event the United States is deemed a proper party to this action, because the United States has not joined Mr. Stone in asserting those claims.

Defendants' description of certain information supporting their "government knowledge" related defenses is attached at Tab E.

Defendants object to plaintiffs' above description of certain damage claims because, *inter alia*, plaintiffs have not previously disclosed such damage claims. Defendants will file a motion on this issue.

There are no third-party defendants in this action. Rockwell has not asserted any counterclaims, cross-claims or third-party claims.

Plaintiffs' non-stipulated contentions for this section are included with plaintiffs' addendum attached at Tab A. Defendants' non-stipulated contentions for this section are included with defendants' addendum attached at Tab B.

* * *

## PLAINTIFFS' STATEMENT OF CLAIMS

Plaintiffs set forth below a statement of the facts establishing their entitlement to a judgment in their favor for liability and damages. Plaintiffs have not attempted to set forth every event, act, and communication with respect to which they intend to present evidence at trial. Plaintiffs have not attempted to fully summarize the contents of depositions and/or witness affidavits available to both sides. Nor have plaintiffs summarized or reiterated the text of every documentary exhibit upon which they will rely at trial, such documents having been already provided to defendants. Nor have plaintiffs reiterated information regarding the events described below which plaintiffs have obtained through Rockwell's own written discovery responses.

When and if plaintiffs' counsel and investigators interview third party witnesses (including without limitation former Rockwell and government employees) between the date of this Pretrial Order and the date of trial, plaintiffs may obtain additional information regarding their claims. Plaintiffs reserve the right to present at trial any and all such information obtained from third party witnesses after the date of the Pretrial Order.

A. Background

1. Rockwell and the United States, acting through a predecessor agency to the Department of Energy ("DOE"), to wit, the Atomic Energy Commission ("AEC"), entered into Contract No. AT(29-2)-3533, effective June 30, 1975, later redesignated Contract No. DE-AC04- 76DP03533, for the operation by Rockwell of the Rocky Flats nuclear weapons plant.

2. This Contract was subsequently renewed and amended a number of times. By Mod 005 to Contract No.

DE-AC04-76DP03.533, the contract was converted from a cost-plus-fixed-fee type to a cost-plus-award-fee type ("CPAF"), effective February 1, 1979. Effective January 1, 1986, Rockwell and DOE entered into Mod M087 of Contract DE-AC04-76DP03533, which governed Rockwell's performance from January 1, 1986 through December 31, 1988. Effective January 1, 1989, Rockwell and DOE entered into Mod M124 of Contract DE-AC04-76DP03533, which was to govern Rockwell's performance commencing January 1, 1989. EG&G replaced Rockwell as the M & O contractor, effective January 1, 1990.

3. In connection with Mod M087, Rockwell had sought a five-year extension from January 1, 1986 through December 31, 1990. However, cognizant DOE headquarters officials concluded that certain aspects of Rockwell's past performance warranted only a three-year extention, with authority for an additional one-year extension (to enable DOE to recompete the Contract, if necessary). Thus, throughout the period from January 1, 1986 through March 3, 1988, when the DOE's Undersecretary granted Rockwell a further five-year extension, Rockwell was aware that the quality of its performance was being closely scrutinized by DOE to determine whether Rockwell should receive any further Contract extension.

4. Throughout the period from January 1, 1986 through December 31, 1989, the pertinent provisions of Rockwell's Contract with DOE required Rockwell to:

- to manage, operate, and maintain the Rocky Flats Plant in accordance with the other terms and conditions set forth in the Contract, and in accordance with directions and instructions of the Contracting Officer;

to manage, operate, and maintain the Rocky Flats Plant in accordance with programs approved by the Contracting Officer;

- to use its best judgment, skill and care in all matters

pertaining to the performance of the Contract;
- to comply with all applicable environmental, safety and health regulations and requirements (including reporting requirements) of the Department of Energy;
- to procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of the United States and Colorado; and
- to have its managerial personnel acted toward DOE in good faith and without willful misconduct.

5. Throughout the period from January 1, 1987 through December 31, 1989, the pertinent provisions of Rockwell's Contract with DOE defined the "allowable costs" which Rockwell was permitted to charge to the government as those costs that were necessary and incident to the performance of the Contract in accordance with its terms. The Contract expressly stated that certain costs were deemed unallowable costs which Rockwell was not permitted to charge to the government. Unallowable costs included the costs of defending actions or proposed actions of the United States, and the costs arising from any action, in which Rockwell, or its agents or employees, was liable of committing fraud, submitting false certifications, or other similar conduct.

B. Pondcrete And Saltcrete

1. Plaintiff United States contends that Rockwell breached the foregoing duties in regard to "pondcrete," "saltcrete," and "spray irrigation," and plaintiffs United States and James S. Stone contend further that Rockwell committed a violation of the False Claims Act and common law fraud in relation to these activities. The government contends Rockwell was unjustly enriched as a result, and received payments of government funds by mistake.

2. One of the laws by which Rockwell was contractually bound to comply was the Resource Conservation and Recovery Act of 1976 ("RCRA"), Title 42, U.S.C. §§ 6901 et

seq., as amended. RCRA prohibits the treatment, storage and disposal of hazardous wastes without a permit or interim status. In order to obtain a RCRA permit or interim status, a facility must submit a RCRA Part A permit application and subsequently a Part B application, which must be approved by federal and/or state authorities. During the time period relevant to plaintiffs' claims in this case, in order to treat, store or dispose of hazardous wastes at an interim status facility, RCRA required compliance with rules and regulations promulgated at Title 6, Colorado Code of Regulations 1007-3, Colorado Hazardous Waste Regulations ("6 C.C.R. 1007-3"), Parts 265 and 270.

3. RCRA permits and interim status are more than mere licenses. They impose conditions on a facility's hazardous waste activities. Owners and operators of hazardous waste facilities are required to ensure that all hazardous wastes are appropriately handled and that all RCRA requirements are satisfied.

4. As more particularly described below, Rockwell did not comply with RCRA; to the contrary, Rockwell materially breached the contract provisions, including by committing felony violations of RCRA in the course of its pondcrete and saltcrete operations (see Plea Agreement, Count 1), and by breaching the other duties set forth above, thereby resulting in DOE's incurrence of award fee and base fee costs that DOE would not have paid, had Rockwell told DOE the truth; costs of manufacturing pondcrete and saltcrete that DOE would not have deemed an allowable cost, had Rockwell told DOE the truth; and approximately $150,000,000 of damages to repair pondcrete and saltcrete manufactured by Rockwell. Furthermore, Rockwell concealed information from DOE, and made false, fraudulent, and misleading written and oral statements, and communicated distortions and half-truths, to DOE regarding the pondcrete and saltcrete operations, their

conformity with RCRA, and the quality of the pondcrete and saltcrete Rockwell was producing. Rockwell thereby caused DOE to pay more in award fees and base fees to Rockwell, more in pondcrete and saltcrete manufacturing and repair costs to Rockwell, and more in pondcrete and saltcrete repair costs to others, than DOE would have had to pay, had Rockwell told the truth to DOE.

5. "Pondcrete" is a mixture of cement and sludge from a surface impoundment at Rocky Flats known as solar evaporation pond 207A, shaped in large rectangular blocks. At all material times, solar pond sludge was treated, and pondcrete was manufactured, in or about Building 788 at Rocky Flats.

6. "Saltcrete" is a mixture of cement, salts and salt brine from liquid waste treatment processes in Building 374, shaped in large rectangular blocks. At all material times, salts and salt brine were treated, and saltcrete was manufactured, in or about Building 374 at Rocky Flats.

7. Rockwell has admitted that "pondcrete" and "saltcrete" were hazardous wastes within the meaning of RCRA, 42 U.S.C. §6903(5), and 6 C.C.R. 1007-3, Part 261.

8. Rockwell was required to comply with RCRA interim status storage requirements in storing pondcrete and saltcrete.

9. Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3, § 265.31 required Rockwell to maintain and operate its interim status facilities in such a way as to "minimize the possibility of ... any unplanned sudden or non-sudden release of hazardous wastes or hazardous waste constituents to air, soil, or water which could threaten human health or the environment."

10. 6 C.C.R. 1007-3, § 265.173 required Rockwell to handle and store pondcrete and saltcrete containers in a manner that would prevent them from rupturing or leaking.

11. 6 C.C.R. 1007-3, §265.15(c) required Rockwell to

"remedy any deterioration or malfunction of equipment or structures ... on a schedule which ensure[d] that the problem [did] not lead to an environmental or human health hazard. Where a hazard [was] imminent or ha[d] already occurred," Rockwell was required to take immediate remedial action.

12. Beginning in approximately October 1986, Rockwell knowingly stored pondcrete and saltcrete blocks on an outdoor pad known as the "750 pad." Rockwell subsequently knowingly stored pondcrete and saltcrete blocks on the "904 pad."

13. During or about the same period, Rockwell knew that a substantial number of pondcrete and saltcrete blocks were not in fact solid. Pondcrete was often a sludge-like or semiliquid material. Saltcrete was prone to expansion and crystallization.

14. During or about the same period, Rockwell was aware that pondcrete and saltcrete constituents were leaching and being released from the pondcrete and saltcrete material onto the 750 and 904 pads.

15. During or about the same period, Rockwell was also aware that pondcrete and saltcrete constituents were running off the 750 and 904 Pads, and failed to correct this condition.

16. Prior to May 23, 1988, Rockwell led DOE to believe through a pattern of false, fraudulent, and misleading written and oral statements, and distortions and half-truths, and concealments and omissions, that the pondcrete and saltcrete blocks stored on the Pads were solid, cement-like, concrete-like, stable, nearly incompressible monolithic blocks (hereinafter "solid"), and that they met applicable laws and regulations governing their handling and storage at Rocky Flats, as well as laws and regulations governing their shipment to, and burial at, the Nevada Test Site ("NTS").

17. Prior to May 23, 1988, Rockwell falsely represented to DOE that the blocks were solid, and that their storage on the Pads should be permitted pursuant to RCRA, and 6 C.C.R. 1007-3. Rockwell did not include pertinent information in such disclosures to DOE that would have informed DOE that the pondcrete and saltcrete were not being properly made or stored, or that a substantial number of blocks were not in fact solid. Instead, Rockwell omitted and concealed such information from DOE.

18. Prior to May 23, 1988, Rockwell told DOE that it was meeting the schedule and requirements of the 1986 Compliance Agreement (described more fully below) in its removal of the solar pond sludge and manufacturing of pondcrete. Rockwell did not include pertinent information in such disclosures to DOE that would have informed DOE that the pondcrete and saltcrete were not being properly made or stored, or that a substantial number of blocks were not in fact solid. Instead, Rockwell omitted and concealed such information from DOE.

19. Prior to May 23, 1988, Rockwell did not disclose to DOE that: (a) a substantial number of pondcrete and saltcrete blocks were not in fact solid; (b) the pondcrete was often a sludge-like or semi-liquid material; (c) pondcrete and saltcrete constituents were leaching and/or being released from the pondcrete blocks onto the pads, and into the environment; (d) Rockwell's processes were inadequate to uniformly ensure that the blocks that Rockwell manufactured were in fact solid; (e) the pondcrete manufacturing equipment often was malfunctioning in a way that substantially impeded Rockwell's ability to produce an acceptable waste form; and (f) the inspection processes for pondcrete were inadequate to detect defective blocks before the blocks were placed on the pads. Rockwell, by its pattern of false, fraudulent, and misleading written and oral statements, and distortions and half-truths, led DOE to

believe the contrary.

20. Had Rockwell informed DOE of the foregoing facts, DOE would have directed Rockwell to cease the production of pondcrete and saltcrete, after which time Rockwell would not have been paid to make pondcrete and saltcrete. Had Rockwell informed DOE of the foregoing facts, DOE would not have incurred approximately $150,000,000 in pondcrete and saltcrete repair costs.

21. It was not until after the spill of May 23, 1988 that DOE began to become aware of those aspects of the pondcrete problems described above. However, following May 23, 1988, Rockwell continued to conceal from, and misrepresent to, DOE (and others including the public and Congress) the fact that Rockwell had become aware of pondcrete problems long before May 23, 1988. Rockwell continued to downplay problems, including the full extent of those problems. Instead of disclosing the truth about its knowledge, Rockwell created the false and misleading impression that it was ignorant of the problems until May 23, 1988.

22. Rockwell continued to misrepresent its knowledge about, and the scope of the pondcrete problems, during the time that it was applying for, and negotiating, the renewal of its Contract with DOE for the contract term commencing January 1, 1989.

23. After the May 23, 1988 spill, Rockwell generated many documents, including an Unusual Occurrence Report ("UOR"), in which Rockwell recognized that the pondcrete spill of May 23, 1988 was a result of an incorrect cement/sludge ratio used in its pondcrete operations, as well as due to inadequate process controls and inadequate inspection procedures.

24. More specifically, the facts supporting plaintiffs' claims relating to pondcrete and saltcrete are as follows:

25. In DOE Order 5820.2, entitled "Radioactive Waste

Management," effective February 6, 1984, DOE established policies and guidelines for the management of radioactive wastes by its contractors. Other orders governing performance by DOE contractors in the Environment, Safety & Health (ES&H) area were implemented, and/or updated or amended, by DOE from time to time.

26. By 1985, Rockwell was aware that mixed wastes, and specifically, the wastes giving rise to ponderete and saltcrete, were becoming subject to RCRA regulation. For example, in an August 22, 1985 memorandum, the Department of Energy's Albuquerque Operations Office ("DOE-AL" or "DOE-ALO") advised DOE's Rocky Flats Area Office ("DOE-RFAO") as follows:

> Attached are three documents which outline the various hazardous waste management deadlines imposed on DOE and EPA by the 1984 RCRA amendments. They may assist you in preparing for the deadlines. The automatic provisions (those which did or will go into effect automatically) were codified on July 15, 1985 (50 FR 28702). Please review the compliance status of your facility (management of both hazardous and mixed wastes) and advise this office by September 17, 1985 of any major issues which may arise as a result of the amendment deadlines."

This memorandum was forwarded by DOE-RFAO to Rockwell officials at Rocky Flats by memorandum dated August 28, 1985. Rockwell responded by memorandum dated September 17, 1985 as follows:

> Rockwell International has identified numerous waste types which present disposal problems due to the unavailability of adequate disposal facilities within the DOE complex. Most problematic are those radioactively-contaminated, hazardous wastes

> subject to RCRA authority. ... Disposal problems are anticipated for the following radioactively-contaminated, hazardous waste streams if they are ultimately determined to be RCRA controlled: ... Evaporator salts and solar pond sludge."

27. In order to satisfy its contractual obligations to properly make, store and ship pondcrete and saltcrete, and to continue to receive payments under its contract, Rockwell submitted applications and related regulatory materials to the United States and certain state agencies, and was required to fully and truthfully disclose to the government matters relating to its pondcrete and saltcrete operations, including compliance with pertinent regulations.

28. During 1985 or earlier, Rockwell had begun the development of a process to mix evaporator salts with cement to form saltcrete, and to mix solar pond sludge with cement to form pondcrete, as a means of disposing of these radioactive mixed wastes in conformity with RCRA and other requirements. Rockwell and DOE contemplated that these materials would be sent to DOE's Nevada Test Site ("NTS") for disposal by burial in the desert.

29. DOE's Nevada Operations Office, which oversaw NTS, had certain requirements that a generator of wastes for burial was required to meet before NTS was allowed to accept such wastes. These were set forth in NVO-185. Among other things, NVO-185 required certain package strength requirements. The purpose of these strength requirements was to support NTS's practice of stacking waste containers on top of one another—sometimes three high or more—in the "pit" where the wastes were disposed.

30. On May 14, 1985, Rockwell sought a waiver of NTS's requirement to use plywood boxes for the burial of pondcrete and saltcrete, seeking instead NTS's permission to utilize "Tri-wall Corrugated Fiberboard Boxes." (This

request followed a number of similar requests by Rockwell for such a waiver dating back to 1979.) Tri-walls were boxes composed of three layers of heavy-duty cardboard with metal banding. Beginning May 14, 1985 and continuing through May 23, 1988, Rockwell repeatedly represented to DOE that the cardboard boxes were not necessary to contain the pondcrete and saltcrete wastes due to the hardness of these waste forms and the inability of the hazardous constituents to migrate from the stable concrete matrix.

31. In addition to Rockwell's representation to DOE that the strength of the pondcrete and saltcrete blocks would be "nearly incompressible," Rockwell constantly conveyed to DOE officials that pondcrete and saltcrete would be rock-hard by repeatedly characterizing these materials in numerous documents and oral statements to as "cemented monoliths," or "concrete monoliths."

32. In approximately July 1985, NTS officials discovered one or more saltcrete blocks that were in a "mushy" condition. NTS immediately reported this to Rockwell, and received assurances from Rockwell's Manager of Waste Operations that this was an anomaly and would not be allowed to happen again.

33. Shortly before July 9, 1985, an employee of the Department of Energy's Albuquerque Operations Office ("DOE-AL" or "DOE-ALO") with responsibility for low-level and mixed waste management issues at Rocky Flats visited the site to observe the pondcrete and saltcrete operations. He believed that Rockwell had made excellent progress in installing, testing, and implementing the pondcrete and saltcrete processes and that a good quality solidified waste form was being produced. This employee prepared a memorandum so stating which was sent to DOE's Acting Area Manager of Rocky Flats.

34. This DOE-ALO employee made a return visit on

September 26-27, 1985, and again received an impression that the processes were working and that Rockwell was producing a satisfactory waste form at that time, a satisfactory waste form being one that was "nearly incompressible." From this time and continuing through May 23, 1988, this employee was never informed by Rockwell that any of the blocks in storage at Rocky Flats were unsatisfactory because they were of a lesser hardness once they had been allowed time to fully cure.

35. On July 31, 1986, DOE, EPA, and the Colorado Department of Health ("CDH") entered into a Compliance Agreement to govern the handling and storage of radioactive mixed wastes at Rocky Flats, including the sludge in the Rocky Flats solar ponds. The parties agreed that the regulatory framework for compliance for the Plant's radioactive mixed waste was 40 C.F.R. Parts 260-271, but, once EPA authorized the State of Colorado to regulate radioactive mixed wastes under RCRA, such radioactive mixed wastes would be governed by the Colorado hazardous waste regulations. DOE agreed to provide closure plans to EPA and CDH for the Rocky Flats solar ponds by August 29, 1986.

36. Section 4(d) of the Compliance Agreement provided that DOE had engaged Rockwell to perform management services at Rocky Flats including activities required to meet DOE's obligations under the Compliance Agreement. On July 31, 1986, DOE's Area Manager advised Rockwell's Plant Manager that meeting the Compliance Agreement obligations was crucial to the continuing operation of Rocky Flats and that DOE was counting on him to take personal responsibility for meeting the commitments and deadlines in the Agreement. (PX 1162) The Compliance Agreement was a program approved by the Contracting Officer, with which Rockwell was contractually obligated to comply.

37. On August 29, 1986, Rockwell submitted to EPA and

CDH a closure plan for the solar ponds. This plan provided that the "sludges in Pond 207-A will be solidified to form pondcrete which will be transported to and disposed of at the Nevada Test Site." (p. 19) The plan further stated that removal of the sludge had begun in June 1985 and would be completed by March 1988."

38. During the fall of 1986, Rockwell hired a company called Chem-Nuclear to review its pondcrete operations. Chem-Nuclear issued a report to Rockwell.

39. Rockwell represented to DOE on October 3, 1986 that "our support of the activities [required by the Compliance Agreement] has been outstanding."

40. On October 9, 1986, Rockwell stated that Rocky Flats had to stop shipping pondcrete and saltcrete to the Nevada Test Site after testing revealed the presence of EPA-listed hazardous constituents in these "cemented waste forms." Rockwell further stated that on-site storage alternatives were being evaluated to house the "cemented product" until appropriate disposal facilities became available. Rockwell represented that "[t]he storage alternative selected will meet legal requirements for such sites." Rockwell also represented that the storage of this material onsite "in a cemented form presents no hazard to the public or the environment." These statements were false, and Rockwell had a duty to correct them, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity.

41. On October 28, 1986, Rockwell represented to DOE that "Rocky Flats complies with the regulations, policies, and criteria as stated in: NVO-185, DOE Order 5820.2," and other DOE orders. Rockwell also represented that as part of its Compliance Agreement duties, Rockwell was ensuring that low-level wastes were being stored in compliance with these regulations. These statements were false, and

Rockwell had a duty to correct them, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity.

42. During the fall of 1986, Rockwell began to knowingly place defective pondcrete blocks into storage on the 750 pad.

43. In November 1986, DOE's Area Manager at Rocky Flats, Earl Whiteman, informed Robert L. Duprey of EPA that the purpose of the triwall boxes was solely to act as a form until the cement was cured. Whiteman further stated that, once cured, the box was not necessary to contain the waste. Whiteman made these statements based on information supplied to DOE by Rockwell and/or upon Rockwell's omissions to disclose information to DOE.

44. On November 13, 1986, in DOE's Award Fee evaluation of Rockwell for the period April 1, 1986 through September 30, 1986, DOE gave Rockwell a "noteworthy achievement" based on its belief that "[s]chedules of the Compliance . . . have been met through an extraordinary effort. High quality work on an extremely compressed timescale has been produced."

45. During the fall of 1986, Rockwell was actively seeking to have DOE extend its Contract for the management and operation of Rocky Flats. On November 19, 1986, Rockwell submitted to DOE its Contract Renewal Report. Therein, Rockwell stated to DOE that it would "assure that all waste forms are stored in a safe, secure manner" was false, and Rockwell had a duty to correct this statement, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and insolid.

46. During the winter of 1986, Rockwell replaced its then pondcrete foreman, Norman Fryback, with Ron Teel. Teel increased pondcrete production rates in part by, among other things, reducing the amount of cement added to the

blocks. Following the May 23, 1988 spill, Rockwell acknowledged that this reduced cement-to-sludge ratio was a major contributor to the existence of insufficiently solid pondcrete blocks on the storage pads.

47. While Teel was foreman, Rockwell's pondcrete operators detected insolid and/or leaking boxes of pondcrete on the pads. Sometimes the pondcrete operators spilled boxes that were being transported by forklift for storage on the pad resulting in the spillage of mushy and/or semi-liquid pondcrete onto the pad. The operators sometimes brought bad boxes (i.e., boxes containing waste forms that were defective) of pondcrete back to Building 788 to dispose of or destroy them and/or to mix in more cement or other substances to harden the boxes.

48. Effective January 1, 1987, DOE and Rockwell amended the Contract to expressly provide that Rockwell would bear any costs arising from acts of fraud and/or false statements by any of its agents or employees in connection with the operation of Rocky Flats. This amendment was later invoked by DOE's Area Manager in January 1988 to deny Rockwell's request, when Rockwell sought reimbursement for defense costs in a false claims lawsuit filed by a former Rockwell employee against the company related to activities at Rocky Flats.

49. Rockwell falsely represented to DOE on January 5, 1987 that it had in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (e.g., a waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem. This was a false statement, inasmuch as Rockwell never implemented such a procedure with respect to pondcrete or saltcrete.

50. On January 15, 1987, Rockwell took credit in its Waste Management Status Report to DOE covering

December 1986 for an increased rate of pondcrete production.

51. On January 29, 1987, CDH approved the RCRA interim status storage of pondcrete and saltcrete in two storage areas at Rocky Flats, including the 750 pad, conditioned, in part, upon Rockwell's conducting sampling of run-off from the 750 pad prior to its discharge.

52. In a Liquid Waste Treatment Facilities Assessment Report in February 1987, Rockwell acknowledged the applicability of the Colorado Hazardous Waste Regulations, and various other regulatory requirements and DOE orders, to the treatment and storage of radioactive mixed wastes at Rocky Flats. The CDH requirements, found at 6 CCR 1007-3 required, among other things, that hazardous waste facilities be maintained and operated in such a manner as to minimize the possibility of any unplanned release of hazardous waste constituents into the environment, and containers holding hazardous wastes not be stored or handled in a manner that might cause them to rupture or leak. Rockwell stated in the Liquid Waste Treatment Facilities Assessment Report that it was following these hazardous waste regulations in regard to saltcrete and pondcrete.

53. In this Liquid Waste Treatment Facilities Assessment Report, Rockwell falsely represented that pondcrete and saltcrete were "being stored at [Rocky Flats] conforming to all RCRA requirements."

54. On February 26, 1987, in its Waste Management Status Report to DOE for the preceding month, Rockwell touted the number of pondcrete blocks it had produced that month. Rockwell also stated to DOE that the "concentration of sludge being cemented in the pug-mill remains at 21% with the use of the hydrogrind pump ...."

55. On March 1, 1987, Rockwell falsely represented to DOE that "[p]ond-creting was selected since the basic

technology has been used and proven to effective, since the plant has experience with the process and since pondcreting meets the requirements of the Nevada Test Site for solidification of radioactive wastes." This statement was false, and Rockwell had a duty to correct it, once Rockwell was aware that there was pondcrete and saltcrete in storage that was leaking, leaching, and of less than a "nearly incompressible" solidity. This statement also was misleading because it did not contain a full disclosure of the problems Rockwell was encountering with the pondcreting process.

56. In March 1987, as a result of the run-off sampling directed by CDH, a Rockwell employee found evidence of leaching from the pondcrete blocks on the 750 pad, and reported this to his manager. However, Rockwell did not report this to DOE.

57. On March 23, 1987, Rockwell told DOE that "[p]roduction of pond crete [sic] waste boxes continues to exceed the established goals." This statement appeared in Rockwell's Waste Management Status Report covering February 1987.

58. Rockwell's claim for its award fee for FY 87-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

59. In May 1, 1987, Rockwell again found leaking and insolid boxes of pondcrete on the 750 pad, and leaking saltcrete in Building 788.

60. During June 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

61. On June 4, 1987, Rockwell falsely represented to DOE in a draft letter Rockwell prepared for DOE to send to CDH that there was an inability of the hazardous constituents in pondcrete to migrate from "the stable concrete matrix," and Rockwell further falsely stated to

DOE that "our present storage arrangements are adequate for short term protection against the elements."

62. In its self-analysis to DOE dated June 23, 1987, Rockwell falsely and misleadingly stated: "All compliance agreement dates have been and are being met."

63. Throughout the summer and fall of 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

64. On July 6, 1987, Rockwell falsely and misleadingly stated to DOE that "[p]roduction of pondcrete boxes continued to exceed the established goals." The statement was made in Rockwell's Waste Management Report covering May 1987, the month in which Rockwell's inspector had found leaking and insolid pondcrete on the 750 pad and leaking saltcrete in Building 750.

65. On August 4, 1987, Rockwell falsely and misleadingly told DOE that "[t]he Solar Pond Cleanout operation continues to exceed the established goals although maintenance downtime has increased slightly." Rockwell disclosed minor processing problems to DOE in this document, its Waste Management Status Report for June 1987, but did not inform DOE that it was finding leaking, leaching, and insolid pondcrete blocks on the pad and leaking saltcrete in Building 750, which facts placed Rockwell on notice that, absent corrections (which Rockwell did not implement until after the May 23, 1988 spill) its pondcrete and saltcrete processing operations were seriously flawed, inasmuch as they were turning out blocks that were not, and would not, harden to the necessary solidity.

66. In early August 1987, Rockwell's Waste Operations personnel conducted DOE-RFAO employee Tod Anderson on a tour of the 750 pad. They directed Anderson to a group of pondcrete boxes that had been stored on the pad the

longest and told him it was a representative sample. Rockwell knew this statement was false and misleading, inasmuch as it had reduced the amount of cement in the newer boxes, thereby increasing the likelihood that newer pondcrete blocks would be defective. Anderson touched the material in a box shown him by Rockwell personnel and found that it was hard like concrete.

67. On August 19, 1987, Rockwell falsely and fraudulently represented to DOE that

> "The majority of the mixed waste now accumulating on-site in storage is stored in stable form as concrete blocks (saltcrete or pondcrete)."
>
> "These waste forms ... are meeting all RCRA waste storage requirements. Weekly inspections of the waste storage areas are conducted to preclude environmental releases."
>
> "No leaching of hazardous constituents from pondcrete has been identified."
>
> "No response action is necessary for [pondcrete or saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."

68. During September 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

69. In a Waste Management Status Report submitted to DOE on September 3, 1987 (covering July 1987), Rockwell falsely and fraudulently told DOE: "The Solar Pond Cleanout operation continues to exceed the established goals." The statement went on to describe minor problems with the operation and stated: "Maintenance has provided improved support to complete many of the repairs," thereby misleadingly representing that the only problems known to

Rockwell with regard to the pondcrete and saltcrete operations were minor ones, and that Rockwell was immediately resolving all such problems.

70. In a RCRA/CERCLA Program Status September 9, 1987, Rockwell continued to mislead DOE regarding the quality of the blocks resulting from the pondcrete and saltcrete processes by advising DOE that these blocks were "cemented," and by failing to inform DOE that it had detected insolid, leaking and leaching pondcrete in the storage areas.

71. Around this time, Rockwell's management considered switching to plywood boxes to store newly poured pondcrete boxes. Rockwell's Manager of Waste Operations recommended that, since Rockwell was close to cleaning out Pond 207A, Rockwell stay the course by continuing to use triwall boxes. Rockwell's President, Dominic Sanchini, accepted this recommendation and determined that Rockwell would continue with triwalls for new pondcrete.

72. On September 23, 1987, Rockwell stated to DOE in its self-appraisal: "Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives ... The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats." This statement was false and misleading, given Rockwell's nondisclosure of the existence of leaking, leaching, and insolid pondcrete on the pads.

73. On September 30, 1987, in its Waste Management Status Report covering August 1987, Rockwell falsely and misleadingly told DOE: "The Solar Pond Cleanout operation continues to exceed the established goals."

74. Rockwell's claim for its award fee for FY 87-2 was false or fraudulent, because Rockwell knowingly used false

or fraudulent statements to get it paid and approved.

75. Rockwell's claim for costs for FY 87 was false or fraudulent, because Rockwell knowingly included costs for defective pondcrete, and because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

76. During October 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

77. During November 1987, Rockwell's pondcrete operators, conducting RCRA inspections on the 750 pad, found evidence of leaking from the pondcrete containers.

78. On November 23, 1987, Rockwell falsely and fraudulently stated to DOE that switching to plywood boxes to store newly poured pondcrete was unnecessary, because these waste blocks were "noncompressible."

79. Rockwell again falsely represented to DOE in November 1987 that it had in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem.

80. On December 15, 1987, Rockwell submitted a RCRA Part B Operating Permit Application that falsely stated:

> "Radioactive mixed waste materials at Rocky Flats are identified, characterized, handled and disposed in a manner which provides for safety of personnel, facilities, and the environment, and which meets the requirements of the Resource Conservation and Recovery Act (RCRA)."
>
> "Solar pond sludge and water are mixed with Portland cement and packaged in fiberboard tri-wall boxes according to Rocky Flats procedures. These packages are frequently checked to assure a

complete solidification of the sludge."

81. In a December 23, 1987 six-month self-analysis, Rockwell falsely and fraudulently stated to DOE: "All RCRA Compliance Agreement requirements and schedules are being met."

82. On January 28, 1988, Rockwell falsely and fraudulently informed DOE: "Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of saltcrete and pondcrete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms."

83. In February 1988, Rockwell falsely and fraudulently represented to DOE that

> "No response action is necessary for the [pondcrete and saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."
>
> "No leaching of hazardous constituents from pondcrete has been identified via environmental sampling surveillance."

84. On February 17, 1988, DOE headquarters procurement officials recommended to DOE's Undersecretary that Rockwell's contract be extended for the contract term commencing January 1, 1989, based in part upon their belief that Rockwell was complying with RCRA and with the Compliance Agreement. The report recommending this action stated in pertinent part:

> "All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with

approved exceptions, was achieved."

"In July 1986, DOE signed a Compliance Agreement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner."

These were false statements which Rockwell caused to be made. The Undersecretary approved the contract extension in March 1988.

85. On February 29, 1988, Rockwell responded to NTS audit findings by falsely and fraudulently telling DOE: "The triple-wall boxes in the lower layers have buckled due to the void space at the top of each package and the prolonged storage." This report was misleading, inasmuch as it suggested that problems with pondcrete were limited to damaged tri-wall containers and did not implicate the waste form itself. For example, the same day, Rockwell forwarded to DOE a waste certification procedure which characterized pondcrete as a "solid cured mass." This same procedure repeated Rockwell's false statement about Rockwell having in place a procedure whereby, when a pondcrete or saltcrete waste package was rejected for a major defect (waste form nonconformance), Rockwell's Quality Engineering department would conduct an investigation to prevent recurrence of the problem.

86. On March 4, 1988, Rockwell prepared a report which contained the following false and fraudulent statements:

"Pond crete is a dry solid consisting of ... sludge immobilized in a concrete matrix."

"[There is an] inability of constituents to migrate

from the stable concrete matrix..."

"The current storage arrangement appears adequate for short-term storage."

87. Rockwell's claim for its award fee for FY 88-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

88. On April 5, 1988, Rockwell falsely and fraudulently stated to DOE that "[a]ll RCRA Compliance Agreement requirements and schedules are being met."

89. Prior to May 23, 1988, there were spills of pondcrete and/or saltcrete that Rockwell knew about, and did not disclose to DOE.

90. On May 23, 1988, pondcrete spilled on the 904 pad and Rockwell (for the first time) reported to DOE that there was insolid pondcrete on the pad. DOE immediately ordered a halt to pondcrete production.

91. Notwithstanding this spill, Rockwell was still on June 1, 1988 providing assurances to DOE that the pondcreting process had worked properly. In a June 1, 1988 version of the Solar Pond Closure Plan, Rockwell stated: "The basic technology used to solidify pond sludges and sediments into pond-crete is the same as that for making salt-crete. Pond-creting was selected because the basic technology has been used and proven to be effective, because the plant has experience with the process [sic] the pond-crete meets the requirements of the Department of Transportation (DOT) regulations for shipping, and the material meets the requirements of the Nevada Test Site for solidification of radioactive waste."

92. On June 30, 1988, Rockwell submitted to DOE the first of three versions of a UOR on the May 23, 1988 pondcrete spill. This report, and the subsequent versions submitted on November 14, 1988 and February 23, 1988 were false and fraudulent in that they indicated that the

problem of pondcrete insolidity on the pads was only discovered by Rockwell on May 23, 1988.

93. Beginning on May 23, 1988 and continuing through December 31, 1989, Rockwell continued its fraud upon DOE in connection with pondcrete and saltcrete by repeatedly falsely stating that the problem of leaching, leaking, and insolid pondcrete on the storage pads was not discovered by Rockwell until May 23, 1988. In some instances, Rockwell caused such statements to be made by DOE officials in letters to other government officials and members of Congress. Rockwell's false and fraudulent statements in this regard include, but are not limited to the following:

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| 5/25/88 | "[T]he unsolidified cement was discovered [on May 23, 1988]." |
| 6/6/87 | "Pond-Crete operations ceased on Monday, May 23rd upon identification of the problem." |
| 6/7/88 | "Pondcrete production operations ceased on May 23, 1988, just subsequent to the discovery of destabilized pondcrete on the 904 pad." |
| 7/22/88 | "It was discovered in late May [1988] that some boxes of the cemented waste form 'pondcrete' had not properly cured. The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall containers, allowing the contents of one box to spill onto the 904 Pad." |

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| 7/22/88 | "Since it was discovered in late May that the cemented waste form ("pondcrete") had not cured properly...The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall (cardboard) containers, allowing the contents of one box to spill onto the 904 pad." |
| 7/29/88 | Rockwell advised DOE that there was a "second" pondcrete spill, and that last May it was discovered that some blocks had not cured. |
| 8/88 | "Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad." |
| 9/15/88 | "Spills have only occurred to date at the 904 Pad." |
| 12/21/88 | Q. When were the defective blocks discovered?<br>A. In May 1988, plant personnel discovered some blocks with unsolidified cement following heavy rains that saturated some of the blocks' fiberboard containers." |
| 9/30/89 | "Two spills of Pondcrete at Pad 750 have occurred to date ... These Pondcrete spills occurred on August 25 and August 28, 1989. Saltcrete spills first occurred on November 1, 1988." (p. 45) |

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| 9/30/89 | "The first spill of pondcrete occurred on May 23, 1988..." |

94. During the summer and fall of 1988, at DOE's direction, Rockwell initiated a process, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above, of having to repackage, reprocess, and repair the pondcrete and saltcrete that it had manufactured.

95. During this period, Rockwell also carried out extensive inspection and testing procedures for all pondcrete and saltcrete blocks, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

96. In 1989, Rockwell continued to inspect, test, repackage, reprocess, and repair the pondcrete and saltcrete it had manufactured, activities that were made necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

97. From 1990 through the present, Rockwell's successor contractors have continued to inspect, test, repackage, reprocess, and repair the pondcrete and saltcrete Rockwell had manufactured, activities that were made

necessary because of Rockwell's failure to properly manufacture, store, and handle the pondcrete and saltcrete in conformity with RCRA and other applicable laws, regulations, and DOE orders, and by Rockwell's misrepresentations, false statements, concealments, and omissions to DOE, which are described above.

98. On June 13, 1989, Rockwell's Chairman and Chief Executive, Donard R. Beall, falsely represented to Secretary of Energy James D. Watkins that "the Plant has been run ... in compliance with applicable laws and regulations."

99. Rockwell's claim for its award fee for FY 88-2 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

100. Rockwell's claim for costs for FY 88 was false or fraudulent, because Rockwell knowingly included costs for defective pondcrete, and because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

101. Rockwell's claim for its award fee for FY 89-1 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

102. Rockwell's claim for costs for FY 89 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get this claim paid or approved.

103. Rockwell's claim for its award fee for FY 89-2 was false or fraudulent, because Rockwell knowingly used false or fraudulent statements to get it paid and approved.

104. Plaintiffs' claims for damages are set forth in the applicable section of the pre-trial order.

C. SPRAY IRRIGATION

1. Plaintiffs United States and James S. Stone contend further that Rockwell also violated the False Claims Act in relation to its spray irrigation activities.

2. From November 26, 1984 and continuing through

December 31, 1989, effluent from the sewage treatment plant at Rocky Flats was generally discharged to the B-3 Pond, from which it was either discharged through Outfall 001 to the B-4 and B-5 Ponds or spray irrigated. Water spray irrigated from the B-3 Pond by Rockwell during this same period also consisted of plant runoff and, at times, may have included intercepted groundwater originating from the solar ponds.

3. Between November 26, 1984 and December 31, 1989, the spray fields located at the east side of the Plant were generally referred to as the "east spray field."

4. The east spray field was comprised of the North Spray Field, located north of the B-series ponds, in the North and South Walnut Creek drainages, and the South Spray Field, located primarily south of the East Access Road, draining to both the South Walnut Creek and Woman Creek drainages.

5. Between November 26, 1984 and December 31, 1989, Rockwell operated Rocky Flats under an NPDES permit issued by EPA.

6. The NPDES permit authorized the discharge of effluent and other waters, in accordance with its terms, into North Walnut Creek, South Walnut Creek and Woman Creek. The NPDES permit established particular locations or "outfalls" where such discharges could occur, set particular parameters or discharge limits at each such outfall, and required that each outfall be monitored and the results reported to EPA.

7. Rockwell understood that it was required to promptly inform DOE of all violations of the 1984 NPDES permit of which it became aware.

8. Between November 26, 1984 and December 31, 1989, Rockwell submitted to DOE a Monthly Monitoring Report which included a draft letter from DOE to EPA regarding NPDES compliance during the preceding month.

9. Between November 26, 1984 and December 31, 1989, Rockwell believed it was a violation of the Plant's 1984 NPDES permit to allow runoff from spray irrigation operations at the east spray fields to enter Woman Creek downstream of the C-2 Pond.

10. In January 1987, Rockwell's east sprayfield spray irrigation activities resulted in the flow of substantial amounts of runoff directly into Woman Creek. Rockwell knowingly failed to include these NPDES permit violations in its Monthly Monitoring Report it submitted to DOE for the month of January 1987.

11. On March 2, 1987, direct runoff of spray-irrigated effluent into Woman Creek as a result of spray irrigation by Rockwell on March 2, 1987 was reported by Rockwell, and was cited by DOE as a "notable deficiency" in Rockwell's "Award Fee Performance Evaluation Report" for the period October 1, 1986 through March 31, 1987.

12. In response to DOE inquiries, in March 1987 Rockwell knowingly repeated to DOE the false statement it had made in the Monthly Monitoring Report provided to DOE for January 1987, and continued to conceal from DOE the NPDES permit violations at the East Spray Field during January 1987 resulting from runoff of spray irrigated effluent directly into Woman Creek.

13. Plaintiffs allege that Rockwell knowingly concealed from or otherwise misled DOE regarding Rockwell's violations of the NPDES permit in January 1987, and has continued to conceal or otherwise mislead DOE regarding these violations to the present.

14. Rockwell's false claim with respect to spray irrigation consists of Rockwell's request for and receipt of the Cost-Plus Award Fee ("CPAF") for the six-month period encompassing the month of January 1987 (October 1, 1986 through March 31, 1987). The false statements submitted by Rockwell in support of this false claim were (1)

the Monthly Monitoring Report submitted by Rockwell to DOE for the month of January 1987; (2) Rockwell's representations to DOE in March 1987 that no NPDES violations involving direct runoff to Woman Creek occurred in January 1987, as reflected in DOE's letter to EPA dated March 19, 1987; and (3) Rockwell's continued concealment from DOE, from January 1987 through December 31, 1989, of the existence of direct Woman Creek runoff in January 1987.

## FALSE STATEMENTS AND CLAIMS BY FISCAL YEAR AND DATE

| Date | False Statement |
|---|---|
| 10/9/86 | "Rocky Flats is currently evaluating on-site storage alternatives to house the cemented product until appropriate disposal facilities become available. The storage alternative selected will meet legal requirements for such sites."<br><br>"The onsite storage of this material in a cemented form presents no hazard to the public or the environment." |
| 10/28/86 | Rocky Flats complies with the regulations, policies, and criteria as stated in: NVO-185, DOE Order 5820.2, DOE Order 5480.3, DOE Order 5480.2, DOE Order 5480.4, and DOE Order 5700.6A<br><br>"As part of the Compliance Agreement, all waste streams at Rocky Flats Plant are being analyzed, ... If hazardous constituents are identified as being present in any low level wastes, storage of such waste forms is initiated to comply with the regulations." |
| 11/86 | The triwall boxes act as a form until the cement has cured; once cured, the box is not necessary to contain the waste. |

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| 11/19/86 | "Rocky Flats will be storing up to approximately 20 million pounds of salt crete and pond crete, primarily on an asphalt pad...Rockwell must actively support DOE in its efforts to certify this site, and in the interim assure that all waste forms are stored in a safe, secure manner." |
| 1/5/87 | "When waste packages are rejected for reasons other than minor errors, a Corrective Action Notification (CAN) Letter must be attached to the card copy of the WRR (see Figure 2). The CAN letter notifies the generator that an inspector must be present when the nonconformance is being corrected... When writing the rejection, the inspector will indicate in the "HOLD" box of the WRR that a CAN letter was attached by writing the letters "CAN" in the this area. Writing "CAN" in the hold box will notify Quality Engineering that this rejection requires an engineering investigation. The WRR will then be forwarded to the responsible engineer for review, investigation and recurrent control." |
| 2/87 | "In the interim, the waste [radioactive mixed waste] is being stored at RFP, conforming to all RCRA requirements." |

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| | Rockwell, in the Monthly Monitoring Report it submitted to DOE for the month of January 1987, falsely stated that there were no violations of the NPDES permit that month resulting from runoff of spray-irrigated sewage effluent directly into Woman Creek. |
| 3/1/87 | "The basic technology used to solidify Pond 207-A sludge into pond-crete is the same as that for making salt-crete. Pond-creting was selected since the basic technology has been used and proven to be effective, since the plant has experience with the process and since the pond-creting meets the requirements of the Nevada Test Site for solidification of radioactive waste." |
| | Rockwell, in March 1987, both repeated the false statement it made in the Monthly Monitoring Report provided to DOE in January 1987, and concealed from DOE the existence of NPDES violations at the East Spray Field during January 1987 resulting from runoff of spray-irrigated sewage effluent directly into Woman Creek. |
| Rockwell's Claim for FY87-1 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 87-1 paid or approved. |

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| 6/4/87 | "Our present storage arrangements are adequate for short term protection against the elements..."<br>Pondcrete should be RCRA de-regulated due to "the inability of the constituents to migrate from the stable concrete matrix." |
| 6/23/87 | "All compliance agreement dates have been and are being met." |
| 7/6/87 | "Production of pondcrete waste boxes continues to exceed the established goals." |
| 7/6/87 | "All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with approved exceptions, was achieved."<br>"In July 1986, DOE signed a Compliance Agreement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner" |

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| 8/4/87 | "The Solar Pond Cleanout operation continues to exceed the established goals although maintenance downtime has increased slightly. Problems were experienced with the pond pumper, concrete pumper and lumping of cement in the storage silo." |
| 8/11/87 | Rockwell Waste Operations personnel directed Tod Anderson to a cell of boxes in the area that had been stored on the 750 pad the longest, and represented to Mr. Anderson that this was a representative sample of the boxes in the area. |
| 8/19/87 | "The majority of the mixed waste now accumulating on-site in storage is stored in stable form as concrete blocks (saltcrete or pondcrete)."<br>"These waste forms ... are meeting all RCRA waste storage requirements. Weekly inspections of the waste storage areas are conducted to preclude environmental releases." |
| 8/19/87 | "No response action is necessary for [pondcrete or saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."<br>"No leaching of hazardous constituents from pondcrete has been identified." |

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| 9/3/87 | "The Solar Pond Cleanout operation continues to exceed the established goals."<br>The statement goes on to describe minor problems with the operation and states: "Maintenance has provided improved support to complete many of the repairs," thereby representing that Rockwell is immediately resolving all problems that might impede its ability to produce a satisfactory pondcrete product. |
| 9/9/87 | RCRA/CERCLA Program Status September 9, 1997. False due to use of term "cement block" to refer to pondcrete/saltcrete and the omission to disclose the insolid, leaking and leaching pondcrete on the pads, especially in the context of Rockwell's affirmative statements to DOE in August 1987 described above. |
| 9/23/87 | "Rockwell's six-month self-appraisal provides ample demonstration of its progress in meeting a lengthy list of FY87 second half CPAF goals and objectives...The recent establishment of a RCRA/CERCLA Program is a clear expression of Rockwell's serious intent to be responsive to waste management requirements at Rocky Flats." |
| 9/30/87 | "The Solar Pond Cleanout operation continues to exceed the established goals." |

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| Rockwell's Claim for FY87 Costs, as certified in the FY87 "VANNEA" | False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved. |
| Rockwell's Claim for FY87-2 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 87-2 paid or approved. |
| 11/23/87 | "Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of salt crete and pond crete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms." |
| 12/3/87 | "LLW package content rejections, for example, are assigned the highest level of severity. This level rejection requires a "Corrective Action Notification" letter be sent to the responsible management. It also requires the presence of a WC inspector during the repackaging/corrective action. An investigation is conducted by a WC Quality Engineer with findings used to implement the appropriate recurrence control." |

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| 12/15/87 | "Radioactive mixed waste materials at Rocky Flats are identified, characterized, handled and disposed in a manner which provides for safety of personnel, facilities, and the environment, and which meets the requirements of the Resource Conservation and Recovery Act (RCRA)"<br><br>"Solar pond sludge and water are mixed with Portland cement and packaged in fiberboard tri-wall boxes according to Rocky Flats procedures. These packages are frequently checked to assure a complete solidification of the sludge." |
| 12/23/87 | "All RCRA Compliance Agreement requirements and schedules are being met." |
| 1/28/88 | "Rocky Flats currently has in storage 13,000 Tri-wall corrugated fibreboard boxes of solidified blocks of salt crete and pond crete which are considered low level mixed waste. Repackaging these in wooden boxes would provide a one time cost impact of $1,500,000 and a continuing additional cost of $120,000 per year. This seems unwarranted considering the noncompressible, stable nature of these waste forms." |

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| 2/88 | "No response action is necessary for the [pondcrete and saltcrete]. All areas have waste management being conducted in full compliance with all applicable rules and regulations."<br><br>"No leaching of hazardous constituents from pondcrete has been identified via environmental sampling surveillance." |
| 2/17/88 | "All deadlines required by the Rocky Flats Compliance Agreement were met and the Resource Conservation and Recovery Act compliance, with approved exceptions, was achieved." "In July 1986, DOE signed a Compliance Ag eement with the Environmental Protection Agency, and the Colorado Department of Health which committed DOE and Rockwell to an extremely aggressive environmental monitoring and remedial action program. Rockwell has met or exceeded all Compliance Agreement requirements in an outstanding manner." |

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| 2/29/88 | Characterizing pondcrete and saltcrete as a "solid cured mass".<br>"When waste packages are rejected for reasons other than minor errors, a Corrective Action Notification (CAN) letter must be attached to the card copy of the WRR (see figure 2) by the Inspector or the responsible Quality Engineer. The CAN letter notifies the generator that an inspector must be present when the nonconformance is being corrected...The WRR will then be forwarded to the responsible engineer for review, investigation, and recurrence control." |
| 2/29/88 | "The triple-wall boxes in the lower layers have buckled due to the void space at the tope of each package and the prolonged storage." This report characterizes the problems, which require repackaging, as limited to problems with the tri-wall containers. |
| 3/4/88 | "The current storage arrangement appears adequate for short-term storage."<br>Pondcrete ought to be RCRA de-regulated due to "The inability of constituents to migrate from the stable concrete matrix..."<br>"Pond crete is a dry solid consisting of ... sludge immobilized in a concrete matrix." |

| Rockwell's Claim for FY88-1 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 88-1 paid or approved. |
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| 4/5/88 | "All RCRA Compliance Agreement requirements and schedules are being met." |
| 5/25/88 | "[T]he unsolidified cement was discovered [on May 23, 1988]." |
| 6/1/88 | "The basic technology used to solidify pond sludges and sediments into pond-crete is the same as that for making salt-crete. Pond-creting was selected because the basic technology has been used and proven to be effective, because the plant has experience with the process [sic] the pond-crete meets the requirements of the Department of Transportation (DOT) regulations for shipping, and the material meets the requirements of the Nevada Test Site for solidification of radioactive waste." |
| 6/6/87 | "Pond-Crete operations ceased on Monday, May 23rd upon identification of the problem." |
| 6/7/88 | "Pondcrete production operations ceased on May 23, 1988, just subsequent to the discovery of destabilized pondcrete on the 904 pad." |

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| 7/22/88 | "It was discovered in late May [1988] that some boxes of the cemented waste form 'pondcrete' had not properly cured. The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall containers, allowing the contents of one box to spill onto the 904 Pad." |
| 7/22/88 | "Since it was discovered in late May that the cemented waste form ("pondcrete") had not cured properly...The problem was first discovered when heavy rains saturated some of the pondcrete blocks' triwall (cardboard) containers, allowing the contents of one box to spill onto the 904 pad." |
| 7/29/88 | Rockwell advised DOE that there was a "second" pondcrete spill, and that last May it was discovered that some blocks had not cured. |
| 8/88 | "Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad." |
| 8/9/88 | Boxes of destabilized pondcrete were not moved back to Building 788 before the May 23, 1988 spill. |
| 3/25/88 | "Pondcrete production operations ceased on Monday, May 23, 1988, just subsequent to the initial discovery of destabilized pondcrete on the 904 pad." |

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| 9/15/88 | "Spills have only occurred to date at the 904 Pad."<br>"After an initial period on the 750 storage pad where levels of gross alpha, gross beta, and nitrate were elevated, the levels of contaminates [sic] have decreased. This may have been due to 'dirty' pallets, boxes, and vehicles, with normal precipitation washing the contaminants off." |
| Rockwell's Claim for FY88 Costs, as certified in the FY88 "VANNEA" | False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved. |
| Rockwell's Claim for FY88-2 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 88-2 paid or approved. |
| 11/14/88 | Discovery of pondcrete insolidity occurred on 5/23/88. |
| 12/21/88 | Q. When were the defective blocks discovered?<br>A. In May 1988, plant personnel discovered some blocks with unsolidified cement following heavy rains that saturated some of the blocks' fiberboard containers." |
| 2/23/89 | Discovery of pondcrete insolidity occurred on 5/23/88. "These incorrect ratios resulted in Pond-crete which did not thoroughly cure." |

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| Rockwell's Claim for FY89-1 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 89-1 paid or approved. |
| 6/13/89 | "In our judgment the Plant has been run ... in compliance with applicable laws and regulations." |
| 9/30/89 | "Two spills of Pondcrete at Pad 750 have occurred to date ... These Pondcrete spills occurred on August 25 and August 28, 1989. Saltcrete spills first occurred on November 1, 1988." (p. 45) |
| 9/30/89 | "The first spill of pondcrete occurred on May 23, 1988..." |
| Rockwell's Claim for FY89 Costs, as certified in the FY89 "VANNEA" | False Claim due to the inclusion of costs for defective pondcrete and saltcrete, and the use of false or fraudulent statements to get costs claims paid and approved. |
| Rockwell's Claim for FY 89-2 Award Fee. | False due to the use of false or fraudulent statements to get Rockwell's award fee claim for FY 89-2 paid or approved. |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 2
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:05 a.m. on the 23rd day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

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[209]

* * *

Over the three years that are important to this case, 1987, '88 and '89, the government gave Rockwell budgets of over $1 billion to operate Rocky Flats in compliance with applicable laws and regulations. In return, as the evidence we will introduce will show, Rockwell lied about its handling of radioactive toxic pondcrete waste blocks, which Rockwell knew were leaking into the environment.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 3
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:01 a.m. on the 24th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William Francis Weston]

[601]

* * *

Q Now, do you recall an event that occurred on May 23rd, 1988 which pondcrete spilled on the 904 Pad?

A Yes, I do.

Q Were these visits occurring prior to that date?

A Yes, they were. [602]

Q Now, prior to that date did you ever observe any pondcrete blocks on the pad or pondcrete containers on the pad that were leaking--leaking their contents onto the 750

Pad?

A No, sir, I did not.

Q Did you ever observe any pondcrete containers on the pads that were mushy?

A No, sir. I was never aware that there were any mushy containers on the pad prior to May 23rd, 1988.

Q Did you observe any containers on the pads that had pondcrete that for any reason appeared to you to be semiliquid?

A No, sir, I did not--was not aware of any.

Q How did the pondcrete boxes on the pads look to you?

A The pondcrete boxes on the pad in many cases looked very bad --

Q That's the cardboard?

A The cardboard itself was very deteriorated.

Q What about the waste forms themselves inside the cardboard?

A I was not aware that there were any problems with the waste form as in particularly is regard solidification. I was aware that some of the boxes had squashed down some and there was some bulging, but I was not aware that we had a solidification issue prior to May 23rd.

* * *

[631]

* * *

Q We talked a fair amount today about the May 23rd, 1988 pondcrete spill. What do you recall about that spill?

A In a few days before May 23rd, 1988 we had a pretty good rainstorm with winds and there was a lot of damage done, additional damage done to the packaging material. There was a lot of standing water on the pads. The tarps had water on them. The cardboard had deteriorated even further. And, on May 23rd, our crews were out there trying to remediate some of the leaners. They were severely leaning and they dropped one and it split open and its

contents were unsolidified. [632]

Q How did you hear about this? At first?

A I think I was notified by the shift superintendent. I drove in--I came to work fairly early. I used to get in about quarter to 6:00. And as I came up Central Avenue, I saw some guy, or guys, out on the pad, 904 pad. And that didn't surprise me, because after a storm they'd be out there trying to put tarps back in place and clean up and re-stack if necessary.

And in some time within, I think the next hour, I had gone up to my office. I got a call saying that a box had been dropped and split open and we had a spill. And I came down to the pad.

* * *

[635]

* * *

Q Who else was out at the pad.

A Besides our people, Ed Naimon and some of his staff, and of course, the pondcrete workers. I know Kirk McKinley and some of his people went down from the RCRA standpoint, because we were going to have to report a spill up through the Department of Energy to the regulatory agencies. And I believe there were DOE or FAO people who came out during the day to the pad.

Q Do you recall who they were?

A I think Tod Anderson was one. I can't remember if Earl Whiteman came down or not at that point. I know Earl was down some time within the few days, because as we began to see the extent of the issue, Earl came down.

Q And you said you had to notify the regulators due to the fact that there had been a spill?

A This was I think a reportable spill, under RCRA, and as I recall, then we began to go through the formal notification process.

Q And that was a requirement under RCRA?

A Yes, sir.

Q Was it a cause for concern to you that pondcrete had [636] spilled onto the pad? I mean from an environmental perspective?

A I wasn't immediately concerned that we had a huge contamination issue. It was contained. Pondcrete was a relatively innocuous waste form compared to a lot of the others we had. So I knew we could contain it, and there wouldn't be any environmental harm. What I was concerned about was the consistency.

Q When you say it was contained, you mean it was still in the container?

A No, no. But it was a localized area on the pad, and was not like running off the pad, or anything, so we had an opportunity to vacuum it up, clean it up, absorb up the remainder, and handle it that way.

Q What did it physically look like, the pondcrete that had come out of the container onto the pad?

A It was—I'm trying to remember. There was a lot of liquid. And it was sludgy. Solids and liquids. This thing had fallen, you know, from a pretty good height off the forklift and broken open, so it was splattered. And it, you know, it looked like a mess.

Q Do you remember the color?

A No, I don't.

Q And were actions taken then to clean that up?

A Oh yes. Immediately. [637]

Q What was done exactly?

A Well, the immediate remediation would be to clean up all the waste forms, and they get prepared to remediate, and then probably—I think what we did is, we put it in either a plywood or a metal container. And then shoveled up what we could, and then wiped up the rest, and then washed it down.

That was the way you would handle the spill.

Q Were there other boxes on the pad that then were discovered that had unsolid pondcrete?

A Yes, sir. Within the day and the day following, as we began to de-stack and remediate areas, we began to see

more and more of these where it was clear, now that the cardboard was essentially totally gone from the standpoint of any strength to it, that these, you could push in on them—and we began to look more, of course, too. To push in on the sides as we got the boxes down. And began to discover more and more of them. And it was a bigger and bigger concern to us.

Q Did you send your people out right after the spill to check the pad to see if there were others?

A Would you say that again, please?

Q Did you send your people out to sort of canvas the pads to see if there were other problematic boxes now that the spill had occurred?

A Absolutely. I didn't even have to tell them to do that. That was an automatic, that we were going to go out and check [638] both pads now and see what the extent of the problem was.

Q And they found boxes like the one that had spilled?

A They started to find boxes, yes.

Q And they started to find the boxes so it was really a discovery for you and for them?

A Yeah. And I got a report from Dr. Naimon within a day, something like that, when he began to estimate the amount of boxes. And the percentage was high. I mean we're talking several thousand boxes that we were guesstimating could be of this consistency, and we were amazed.

Q And as of May 22nd, 1988, none of your people had noticed this several thousand boxes out there?

A To my knowledge, no, sir.

Q But they noticed them on May 23rd, May 24th?

A As we began to unstack, yes. Some of them were very obvious.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY – DAY 4
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:04 a.m. on the 25th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William Weston]

[784]

* * *

A In the days immediately following the incident on May 23, 1988, we wanted to try and get our arms around the problem, how many of these boxes potentially could be—could have unsolidified pondcrete. And so we went after the worst stacks, the ones that had the most leaners, and tried to take them all done and see how many of these really look like they could be bad because we couldn't open them on the pad.

So we just had to basically go by the deformation of the container, and if we could and it was—the container was deteriorated enough, then actually try and press the material.

And we tried to make some estimates then and [785] extrapolate across all 17,000 blocks as to how many it could be.

* * *

[786]

* * *

Q ... Okay. So you knew, then, the basis for making that estimate of 2,000 was that there were—what are these dates, November, '87, March, '88? Is that the date of manufacture?

A Those are the date of manufacture, yes, sir, Mr. Williams.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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|---|---|---|
| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY – DAY 5
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 26th day of February, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Norman Fryback]

[981]

* * *

Q When you first started working on the project, Mr. Fryback, do you recall whether the pondcrete equipment had actually arrived from the contractor yet?

A Some of it was installed and some of it wasn't. My job was to coordinate the installation of the equipment.

Q And what was your position at the time you started working on pondcrete?

A I was a foreman.

Q And that was a foreman for Rockwell?
A Yes.
Q Who was your superior?
A Garvin Hewitt.
Q And who did Mr. Hewitt report to?
A Mr. Naimon.
Q And who did Mr. Naimon report to?
A Mr. Weston.
Q And do you know who Mr. Weston reported to?
A Mr. Sanchini, plant director.
Q Can you describe for me, Mr. Fryback, what pondcrete is?
A Pondcrete is actually a process of cementation of chemical waste that was collected in solar ponds over a period of years, and it was cemented into a block. [982]
Q Mr. Fryback, would it be fair to describe pondcrete as a mixture of sludge and liquids retrieved from the solar ponds and mixed with Portland cement into a concrete matrix which forms a concrete monolith?
A Yes.
Q When you first started in pondcrete as foreman, what stage—I'm sorry, strike that.
How many shifts did you run as foreman at the beginning of the pondcrete operations?
A One.
Q Who were the operators who reported to you working on the pondcrete project at that time?
A I probably will miss some of the names, but Ralph Sprague, Pat, I can't think of—
Q Is that Pat McNeil?
A Pat McNeil, yes, David—let's see, Davie Morrison was there at the very beginning with me. Gosh, I know there's—I think there were approximately five operators that worked for me, and I can't—
Q Was Leif Swenson there at the beginning?
A No, not at the very beginning.
Q Was Howard Long there at the very beginning?

A I believe he was, but I'm not sure on that, whether he was or not.

Q Do you know that both Mr. Long and Mr. Swenson were [983] there by the time you left as foreman?

A Oh, yes, of course.

Q And when was that, Mr. Fryback, that you left as foreman of the pondcrete operation?

A I believe it was sometime in '86 or '87.

Q At the time you left as foreman of the pondcrete operations, had any storage of the pondcrete begun on either the 750 or the 904 pad?

A No.

Q Can you please describe for the jury in relatively simple straightforward terms how pondcrete was made?

A Portland cement was added to the liquid which was retrieved from the pond with a barge like affair which was called a mud cat. It sucked the liquid up into the clarifier, and then was delivered by a diaphragm pump to an extruder, if you will, a mixing chamber, which was a screw operated operation, and in that, it was fed by a surge tank from a—which was supplied from a master storage tank of Portland cement by air transfer into the surge tank, and then it was dropped into the extruder via a star valve, and mixed through the length of the extruder, and then dropped by gravity into the boxes.

Q Okay. Let me see if I can try this as a layman to put it together as well. You basically had sludge in the ponds; correct? [984]

A Yes.

Q And the idea was to get that sludge out and solidify it; is that right?

A Yes.

Q And the sludge from the pond would be removed by a sucking device, a hose that was on a pontoon boat; is that right?

A Yes.

Q And that hose would in turn go into this clarifier that you mentioned; is that right?

A Correct.

Q And then the sludge would be allowed to settle so that you'd get a solid or a more solid sludge—

MR. WILLIAMS: Your Honor, I think it's not inappropriate to try and repeat the witness's testimony, but he's adding to it at this point.

THE COURT: You are.

Q (by Mr. Williamson) Well, Mr. Fryback, would it be fair to say that the clarifier, the purpose of the clarifier was to take—

THE COURT: Why don't you just ask him what was the purpose of the clarifier?

MR. WILLIAMSON: I was trying to simplify it, Your Honor, but I will do that.

Q (by Mr. Williamson) What was the purpose of the [985] clarifier, Mr. Fryback?

A The purpose of the clarifier was to concentrate the sludge and the liquid was decanted back to the pond, the solar pond, and the concentrated sludge liquid mixed was delivered to the extruder.

Q And the sludge would then go from the clarifier into the pug mill; is that right?

A Yes.

Q And it would be mixed with cement in the pug mill?

A Yes.

Q And the cement came from where?

A It came from the big storage tank that would take approximately two semi-loads of Portland cement.

Q And the sludge and the cement would be mixed together in the pug mill; is that right?

A Yes.

Q And then they would be entered into the tri-wall boxes with the plastic; is that right?

A Yes.

* * *

[1001]

Q Mr. Fryback, ultimately were you replaced as foreman of [1002] the pondcrete operations?

A Yes.

Q And by whom were you replaced?

A Ron Teel.

Q Did—prior to that time, did Rockwell management express to you concerns that you were not making pondcrete fast enough?

A Yes.

Q Did you tell Mr. Hewitt, your supervisor, and Mr. Naimon that there was no way pondcrete production personnel could meet the solar pond clean-up deadlines and maintain pondcrete production at the quality level that was acceptable?

MR. WILLIAMS: Your Honor, that's leading.

THE COURT: It is leading.

Q (by Mr. Williamson) Mr. Fryback, did you ever have a conversation with Mr. Hewitt and Mr. Naimon about the ability to meet the solar pond clean-up deadlines?

A Mr. Hewitt for sure; possibly with Mr. Naimon. The recollection of—my contact with Mr. Naimon was not an everyday affair, as it was with Mr. Hewitt. So I, you know, I can't recall whether or not there was--I'm sure we did talk about it, as you said, yes, but I can't put a date to it or anything.

Q Do you remember what you said to Mr. Hewitt about the ability to meet pondcrete clean-up deadlines and its impact [1003] on quality?

A I didn't think that we could get the quality of monoliths I was shipping to Nevada at that time by increasing the number of boxes. You know, there was just not enough space, not enough drying space. There were too many unknowns.

Q Mr. Fryback, did you have a discussion with Mr. Teel about three weeks after he became foreman of the pondcrete operations concerning the amount of cement used in pondcrete production?

A I believe I did, yes.

Q Can you tell me what Mr. Teel told you?

A That he was using less than I was using.

Q Did he tell you that he was using 150 pounds per box?

MR. WILLIAMS: Your Honor, that's leading.

THE COURT: Sustained.

Q (by Mr. Williamson) What amount did Mr. Teel tell you he was using?

A I believe the 150 to 200 pound number is within reason, that I can remember.

* * *

**[1040]**

* * *

Q Now, backing up to that auger trough, which was—can you say which was the more variable thing that went in there; the cement or the sludge?

A The sludge wasn't consistent. I mean, it was coming out of a settling tank and the settling tank has a V bottom on it and sometimes you'd get a glob of sludge that would come through and that was ideal. You had the right mix. And then, the next time, maybe a slug of water would come through and you'd have a problem. So, it required constant attention and monitoring and then, as the other attorney was talking about, the cement itself varied and you had to keep adjusting that, you know.

Q Well, did you, in fact, adjust the star valve or did it run wide open? Do you remember?

A Well, there was no restrictions on what dumped out of the star valve. The only restriction was—the only thing

was that you would speed the motor up and the star valve would turn faster or slower as per the requirements.

Q When you were actually operating it, do you recall actually turning up or down the speed of the star valve motor [1041] as opposed to adjusting—

A Yeah, I have done that. Yes.

Q Very often?

A My recollections are that it was probably—it wasn't probably done as often as it was throttling down the sludge coming in, you know. I mean, that was an easier control point and much more workable.

Q What you're saying is that the sludge—the variability of the sludge is what you adjusted more often to get the eyeball test passed?

A Right, correct.

Q Okay. Do you have any idea, Mr. Fryback, during the time that you were operating this about how much cement went into a typical box of pondcrete from when you were doing it?

A Anywhere between 200 to 350 pounds.

Q Depending on the sludge?

A Yes.

Q Okay. And, the only test that you used or that you saw anybody use was the eyeball test as to how it looked?

A Yeah. Yeah, we—when I talked to Portland Cement, they had said something about slump and slump testing and stuff like that, but it was—you know, we were dealing with such an impure mix that there was not much of a chance to do that kind of thing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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|---|---|---|
| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 6
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:49 a.m. on the 1st day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Leif Howard Swenson]

[1108]

* * *

Q Okay. And can you just tell the jury the names of the different foreman with whom you worked on pondcrete operations?

A Norm Fryback and Ron Teel and Dan Tallman. That's the three that I recall.

Q Do you remember, sir, when Mr. Teel replaced Mr. Fryback as foreman of pondcrete operations? [1109]

A Yes.

Q When was that?

A I don't recall the date exactly. I believe 1987.

Q Okay. And when did Mr. Tallman replace Mr. Teel as foreman of the pondcrete operations?

A I believe a year or so later.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 7
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:50 a.m. on the 2nd day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[1362]

* * *

THE COURT: * * * Do you have these requests for admission?

MS. VULLO: Yes, Your Honor. I wanted to read those at this time.

THE COURT: All right. I'll explain the procedure to the members of the jury. I mentioned to you earlier in the case about the Rules of Civil Procedure that govern us in civil cases, and I mentioned to you about the taking of depositions before trial ever begins and, of course, you heard about that from various witnesses who depositions

were taken when there were deposition transcripts used at times. [1363]

There's another procedure that is available to the lawyers in the case before the trial ever begins, and this is called request for admissions. And what this rule provides is that either of the parties can submit to the opposing party, that is, the lawyer, a request to admit certain facts without the necessity of having to prove those facts at trial. And then the party who is asked to admit these facts will either admit them or deny them or can admit them with the condition of making an objection to the phraseology, the terminology, used in the question, not the question but the request.

And the rule provides, then, that when admissions are made in response to the request for admissions, the facts admitted or the particular point admitted—sometimes it's just not a direct fact but something that relates to the case—then that can be used at trial without the necessity of evidence to prove, that is, don't call witnesses or produce documents to prove what's admitted.

And in this case there are certain admissions made by the defendants in response to the plaintiff's request, and we're going to read those to you. Counsel will read them to you now, along with any objections that were contained in the response. All right.

MS. VULLO: Just for a point of clarification, and I can do it either way, we had, I thought, agreed not to read the [1364] objections. But I can do it either way.

MS. BENSON: That's correct, Your Honor.

THE COURT: Well, I thought you told me you wanted to read the objections.

MS. BENSON: And my understanding was—what I wanted them to do was read our entire response and not just pick portions of it. So we agreed this morning that the objections would not be read.

THE COURT: All right. Well, you didn't share your agreement with me. How am I to know? Proceed.

MS. VULLO: Thank you, Your Honor. And I'll just

identify for the record what the request for admissions number is.

The first one I'm going to read is Request for Admission No. 122. And the request is to admit the following: From at least November 26, 1984, and continuing through December 31, 1989, a spray field at Rocky Flats known as the East Spray Field was used to dispose of water from the B3 Pond which received treated waste water, contaminated ground water, and plant runoff.

And the response: Rockwell admits that it acknowledged in the plea agreement and statement of factual basis that a spray field known as the East Spray Field was used to dispose of water from the B3 Pond which received treated waste water, contaminated ground water, and plant [1365] runoff. Rockwell further admits that act between November 24, 1984, and December 31, 1989, with the knowledge of DOE. Spray irrigation was used at various spray fields located on the east side of Rocky Flats to dispose of water from Pond B3, which included treated sanitary waste water and plant runoff. Rockwell denies all remaining allegations contained in this RFA.

The next one is Request for Admission 180. And the request is: Beginning no later than November 26, 1984, and continuing through December 31, 1989, Rockwell was required to inform DOE of any violation of the NPDES permit dated November 26, 1984, and applicable to Rocky Flats immediately upon Rockwell's learning or otherwise becoming aware of such violation.

The response: Rockwell admits that between November 26, 1984, and December 31, 1989, Rockwell understood that it was to promptly inform DOE of all violations of the 1984 NPDES permit of which it became aware, but Rockwell denies that between November 26, 1984, and December 31, 1989, Rockwell knew that its spray irrigation operations at the East Spray Field violated the 1984 NPDES permit and denies all remaining allegations contained in this RFA. Rockwell further states that Rockwell informed DOE and DOE otherwise knew of

Rockwell's spray irrigation practices at Rocky Flats.

The next one is 196. The request is: Beginning no [1366] later than November 26, 1984, and continuing through December 31, 1989, Rockwell knew or was otherwise aware that runoff into Woman Creek downstream of Pond C2 of treated sanitary effluent spray irrigated by Rockwell from Pond B3 was prohibited by the NPDES permit dated November 26, 1984, and applicable to Rocky Flats.

Response: Rockwell admits that between November 26, 1984, and December 31, 1989, Rockwell believed it was in violation of the plant's 1984 NPDES permit to allow runoff from spray irrigation operations at the East Spray Fields to enter Woman Creek downstream of the C2 Pond. Rockwell further states that Rockwell informed DOE or DOE otherwise knew of the conditions under which spray irrigation operations were conducted at the East Spray Fields. Rockwell denies all remaining allegations contained in this RFA.

No. 199. The request is: Beginning no later than November 26, 1984, and continuing through December 31, 1989, Rockwell was required to provide to DOE monthly monitoring reports accurately documenting the status of compliance at Rocky Flats with the requirements contained in the NPDES permit dated November 26, 1984, and applicable to Rocky Flats.

The response: Rockwell admits that between November 1984 and December 31, 1989, Rockwell understood that it was to provide to DOE each month a monthly monitoring [1367] report which contained a draft letter from DOE to EPA including any known violations of the 1984 NPDES permit occurring during the prior month. Rockwell further states that Rockwell informed DOE and DOE otherwise knew of the spray irrigation operations conducted by Rockwell at the East Spray Fields. Rockwell denies that it knew that the spray irrigation operations at the East Spray Fields violated the plant's 1984 NPDES permit and denies all remaining allegations contained in this

RFA.

No. 147. Request: On or about March 2, 1987, spray irrigation by Rockwell at Rocky Flats of treated sanitary effluent from Pond B3 resulted in runoff of such effluent into Woman Creek downstream of Pond C2.

The response: Rockwell admits that on March 2, 1987, some treated sanitary effluent sprayed from Pond B3 ran off into Woman Creek downstream of Pond C2. Rockwell denies all remaining allegations contained in this RFA. 149. The request: Runoff of spray irrigated sanitary effluent into Woman Creek as a result of spray irrigation by Rockwell on or about March 2, 1987, was observed by a DOE employee prior to Rockwell having provided DOE notification or otherwise making DOE aware of the runoff of such treated sanitary effluent.

Response: Rockwell admits that runoff of the spray irrigated treated sanitary effluent into Woman Creek as a [1368] result of spray irrigation by Rockwell on March 2, 1987, was first observed by John Krueger, an employee of the DOE Rocky Flats area office. Rockwell denies that Rockwell did not tell DOE and DOE was not otherwise aware of the potential for runoff from the East Spray Fields prior to this date. Rockwell denies all remaining allegations contained in this RFA.

144. Request is: In or about March 1985 a Rockwell employee completed a "Rocky Flats engineering job order" dated March 12, 1985, requesting the construction of a ditch line to divert runoff of treated sanitary effluent spray irrigated from Pond B3 to the south interception ditch and/or Pond C2 stating that runoff water from the spray irrigation system from Pond B3 may be entering Moore Reservoir or Standley Lake via Woman Creek and stating that the proposed collection ditch is necessary to prevent a NPDES discharge permit violation.

Response: Rockwell admits that in or about March 1985 a Rockwell employee prepared a Rocky Flats engineering job order, EJO, dated March 12, 1985. Rockwell states that the EJO speaks for itself and denies all

remaining allegations contained in this RFA.

No. 145. The request is: Between March 1985 and March 1, 1987, Rockwell did not construct the ditch referenced in the Rocky Flats engineering job order dated [1369] March 12, 1985.

Response: Rockwell admits this RFA.

And then the last one is 148. The request is: Subsequent to March 2, 1987, Rockwell installed a trench around the southeastern perimeter of the land area at Rocky Flats located south of the B3 Pond on which Rockwell spray irrigated treated sanitary effluent to divert runoff of treated sanitary effluent resulting from spray irrigation to the C2 Pond.

And the response: Rockwell admits this RFA.

That's it, Your Honor. Thank you.

THE COURT: Members of the jury, under this rule the matters that have been admitted by the defendant Rockwell in response to the request for admissions are established and there's no evidence necessary to establish those matters. They are established.

Now we'll take a recess before calling for the next witness and, as usual, we'll take 15 minutes out for a rest stop, and please continue to follow the cautions you, I know, have heard many times and I'm sure are following. You're excused. 15 minutes.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
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| Defendants. | ) | |

TRIAL TO JURY – DAY 13
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:01 a.m. on the 11th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Raymond Gregory Romatowski]

[2872]

* * *

Q I think I have one last question for you here on this topic. Assume that in September, 1987, Rockwell had come to you and said essentially the same thing, but I'll state it again, we have just discovered there must have been a breakdown in our pondcrete production and inspection process, because we have just discovered a significant number of leaking and insolid blocks on the storage pads. And assume further that you learn that Rockwell had

known of the leaking and insolid pondcrete at least back to May of 1987, [2873] approximately four months prior, and had concealed from DOE its knowledge in that regard, and that Rockwell had, furthermore, made false statements regarding conditions of the pondcrete on the pads, how would you have reacted to that?

A I vehemently—I mean, that would basically undermine the entire relationship between a company like Rockwell and ourselves. It certainly had the potential for destroying credibility with the regulators. Depending on the severity of the problem and how difficult recovery was, it could really set back relationships with the community. The Congressional delegation would have been up in arms, I'm fairly certain. That's the kind of problem any person like me wants to avoid at all cost.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY – DAY 15
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 16th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of William F. Smith]

[3512]

* * *

Q Mr. Smith, where do you currently work?

A I work for the Center for Strategic Environment Enforcement, Office of Criminal Enforcement, U.S. Environmental Protection Agency.

Q And, what position are you in?

A Director and Special Agent-in-Charge.

Q What are your duties in that position?

A I head the office.

Q Can you briefly describe your educational experience since high school, sir?

A Yes. I have a bachelor of arts in political science [3513] from St. Francis College of Pennsylvania. Bachelor of science in biology from Pennsylvania State University.

Q When did you start working with the EPA?

A In 1984.

Q Where were you located at that time?

A In Denver.

Q And, what was your position?

A I was a Special Agent assigned to the Office of Criminal Investigations, U.S. Environmental Protection Agency.

Q What were your duties in that position, sir?

A To conduct investigations into violations of the environmental laws of the United States.

Q And, did your position change at any time after 1984?

A Yes. In 1987, I became the resident agent-in-charge of the Denver office of the Office of Criminal Investigations, U.S. Environmental Protection Agency.

Q Mr. Smith, were you involved in an investigation of the Rocky Flats Plant that involved the execution of a search warrant at Rocky Flats in approximately June 1989?

A Yes, I was.

Q And, what was your role in that investigation?

A I was lead agent for the Environmental Protection Agency.

Q Were there any other agencies involved in this investigation? [3514]

A Yes, there were.

Q And, who were they?

A The Federal Bureau of Investigation and the Department of Energy, Office of Inspector General.

Q And, can you briefly describe for the jury what

occurred in connection with the execution of that search warrant in June of '89?

A In June of 1989, we obtained a search warrant and executed it at the Rocky Flats Nuclear Weapons Plant early that morning. From there, we basically had teams that were set up. Each team had a lead special agent-in-charge of the team and the teams had designated areas to conduct their searches. After we executed the warrant, teams were issued the proper security badges and went out and conducted their searches.

Q And, over approximately how many days did the execution of this search warrant take place?

A I believe, it took approximately 18 days.

Q And, how many agents approximately were involved in the execution of the search warrant?

A There were 110 people involved. Some of them were technical people, samplers, chemists, and probably 80 of them were agents.

Q And, where did these agents come from?

A All over the country. [3515]

Q Who was the contractor at Rocky Flats at the time of the search?

A Rockwell International Corporation.

Q And, did the search involve the—or did the execution of the search warrant involve the buildings and offices that were occupied by Rockwell personnel?

A Yes, it did.

Q And, did the search also involve the buildings and offices occupied by DOE personnel?

A Yes, it did.

Q At some point during the execution of the search warrant, did you begin to investigate a waste product at Rocky Flats known as pondcrete?

A Yes, I did.

Q When was that?

A It was sometime during the course of the warrant, probably after more than five days into the warrant, we

began specifically looking at pondcrete as an investigative issue.

Q Okay. Had you gone into the search with RCRA in mind?

A Yes, we had.

Q Okay. And, what led you to commence this investigation of pondcrete?

A Through the course of driving around the facility, we noticed a storage area that resembled a parking lot with large numbers of blocks covered with tarpaulins. We also [3516] noticed that there was a sign that designated that as, I believe, RCRA Unit 15 which violations of RCRA were one of the key things we were looking at in the course of the execution of the warrant. So, that led us to inquire as to what was out there and what was on that pad.

Q Okay. With respect to the other agencies and agents that were involved in the execution of the search warrant, what was your role from that point forward with respect to the investigation of pondcrete?

A I basically headed up the pondcrete investigation for the task force.

Q What were the first steps that you and the agents working with you took with respect to pondcrete?

A The first steps were to--we went to Rockwell and basically told them we were going to be inspecting the 904 Pad, as it turned out to be called, during the course of the warrant. And, generally, we had people from, I think, it was Health & Safety with us, as well as our own health and safety people whenever we did anything like that. We then went out to the, as it was designated, 904 Pad and conducted sampling and a search of the 904 Pad.

* * *

[3541]

* * *

Q Right. I was kind of curious why it was it took you five days to spot the 904 Pad.

A Because we were busy. When we initially went in we all had assigned tasks to do, so it was only when some of those assigned tasks were completed that we were able then to look at other areas.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 20
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:54 a.m. on the 23rd day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Glenn Lavern Sjoblom]

**[4731]**

* * *

Q Did DOE have problems with waste solidification at its K25 facility in Oak Ridge, Tennessee?

A Uh, yes.

Q What were the wastes being solidified at that facility?

A Similar to Rocky Flats they had some ponds that had liquids and sludges that contained hazardous and radioactive waste and they were required to process those to remove

them a solidify them.

Q How were those pond sludges solidified at Oak Ridge?

A Well, basically, they pumped the liquids and extracted the sludges, and then mixed them in special mixing equipment [4732] with portland cement and fly ash, and then they--after they felt it was mixed adequately, they put them into 55--90- gallon drums for solidification.

* * *

[4739]

Q What were the wastes that were being solidified at West Valley?

A Again, it was pond wastes and sludges. They also had used the practice of collecting liquid wastes in ponds prior to treatment in the waste treatment facility. They had the same similar process.

Q And, what did they use--what medium did they use to solidify these sludges?

A They also used Portland cement. It was generally accepted, the thought anyway, that that was the way to go; mix it with cement.

Q What did they put this mixed cement plus sludge waste in? What containers? What kind of containers?

A They mixed it in drums. They actually did the mixing in the drums at this site.

Q And then, they sealed the drums and where did they store the drums?

A They stored them under a tarp outside.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 21
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:03 a.m. on the 24th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Testimony of Glenn Lavern Sjoblom]

**[4815]**

* * *

Q Now, in your testimony yesterday, sir, I think you said something to the effect that in looking at some of these facilities, you noted that the technology used was not a standard method? Was that something you said yesterday?

A I think it was a generally accepted idea that one could properly solidify these kinds of materials with Portland Cement. But because of the variability of

constituents, because of the problems that result from outside storage, because of the variability in mixture that occurs when [4816] inadequate process controls are used, because of the chemical effects of, for example, nitrates and sulfates on the durability of the cement mixtures, the general idea that one can properly solidify the material doesn't mean that one automatically will unless you thoroughly research the effect your particular wastes are going to have, thoroughly research the proper way to make sure that the range of wastes you have are going to be thoroughly mixed, that the percentages of cement and water and so forth are always within the acceptable ranges.

You won't have a good outcome unless you can do all of those things. And cement solidification had been used before. These are not the first times.

Q In fact, sir, on that—on that point, you mentioned seven different facilities that you testified about relating to late 1980s, early 1990s. How many DOE facilities were there? You mentioned seven. How many were there in total?

A Oh, there's over a dozen. There's also Idaho. There's Mound. There's Fernald. There's Weldon Springs. There's numerous sites.

Q Am I correct, sir, that DOE operated some 100 facilities in 1989?

A Depending on how you define the facility. It could be a single building on a site or it could be—of which there are many. So that would be— [4817]

Q It depends on how you define what a DOE facility is?

A Right. And they may--some of them may have waste processes, and some of them may not.

Q Okay. So let's stick with that. The seven facilities that you discussed in your testimony, those were not the only DOE facilities that had waste processes, are they?

A No, I mean Weldon Springs is a DOE clean-up site in Missouri. Fernald is one in Ohio. In discovery, we weren't given by the Department of Energy or by the plaintiffs in

this case documents on those other sites, and so it was—

Q What's the basis for that statement that you were not given in discovery documents on those sites?

A Just that I didn't receive them, that's all.

Q You don't know whether a request was made and whether it was refused, do you?

A No, I guess I don't.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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|---|---|---|
| UNITED STATES OF AMERICA and UNITED STATES OF AMERICA, ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendants. | ) | |

TRIAL TO JURY - DAY 24
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 9:00 a.m. on the 29th day of March, 1999, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[Closing Argument of Ms. Vullo]

[5079]

* * *

Mr. Fryback also testified that a few weeks after Teel—and you remember Ron Teel, he was our last witness—a few weeks after Ron Teel replaced him as foreman—and that was in late 1986—Teel told Fryback that Teel was reducing

the amount of cement to some 150 to 200 pounds per block, from 600 to some 150 to 200 pounds per block. Fryback also testified that before he was replaced by Teel Rockwell management was pressuring him to make more pondcrete, and Fryback told Hewitt and Naimon that the pressure would result in boxes that were not the right quality of monoliths that [5080] Fryback was shipping to Nevada at the time.

Now, although Fryback was no longer a foreman in '87, he continued to keep a notebook and he even did some inspections of the 750 Pad. He said that one-third of the boxes he inspected were bulging, and it was his opinion that the bulging was because they were not completely solidified.

* * *

[5128]

* * *

You might recall first of all Candy Jierree's testimony that after she learned of the May 23, 1988 spill, she had a conversation with Bill Weston. I told you about one conversation. She talked about another. She said that Weston told her that they tried to maximize waste and minimize cement in order to save money on the cement. What they were doing was they were putting less cement gradually, and the least amount of cement was being done under Tallman because they were trying to exceed their goals. They were trying to get more money from the government. They were trying to get their contract renewed. And Naimon's own documents confirmed the point, you might recall I questioned Naimon about this, and he agreed, the cement was reduced some from 600 to 200. It was reduced throughout the time and continued to be reduced under Tallman's relgn as well.

In fact, even Frank Blaha testified that four days after the May 23, '88 spill, he had a meeting with some of these operators. It was reported to him that less cement was being used. Nobody was talked about the weather or freeze/thaw. They were saying less cement was being used; that's why this thing happened.

In fact, the discoveries after the May 23 spill confirm that there was less cement and, therefore, even less solid pondcrete after Tallman took over as foreman.

* * *

[5135]

* * *

And look at how they describe in here, the same document, in the internal investigation report, after the section on the 750—I'm sorry—after the—I'm sorry, 347. I read to you before the description of 788 building. Under there, they say 904 and 750 pads, internal investigation report says, among other things, "Several of these collapsed under their own weight due to the combination of lack of package integrity and softness of the waste. Preliminary data indicate that not enough cement had been added to the mixture, and efforts are underway to confirm and remedy this situation."

* * *

[5144]

* * *

And, in fact, Tallman's own testimony, the foreman at the time, was that the reason for that de-stabilization—and

that's what it's called, a de-stabilization occurrence, after they said there's a stable concrete waste form, the de-stabilization occurrence, Tallman testified the reason for that was insufficient cement. He doesn't say weather or freeze/thaw.

* * *

[5161]

* * *

No tours of the plant are going to figure out what Rockwell knew, which was inside of there, there was insolid pondcrete, because they were making it wrong, they weren't using enough cement, and they were hiding it from the government.

* * *

[Closing Argument of Mr. Kolar]

[5176]

* * *

Rockwell also admitted in it's UOR report that the causes of the pondcrete problems were causes that were within Rockwell's control. Rockwell was the one that designed the process. Rockwell purchased the equipment. You'll recall some testimony about that. Rockwell installed the equipment. Rockwell's workers watched the equipment, they made the pondcrete, they inspected the pondcrete; and in the UOR report Rockwell essentially admitted that these were things within its control that were the cause: inadequate cement/sludge ratios, poor inspection procedures.

In fact Rockwell never even claimed it used its best efforts in connection with pondcrete and saltcrete until Mr. Stone and the government brought this action to recover the monetary losses stemming from Rockwell's failure to do so.

Rockwell may say to you, but pondcrete was not rocket science. You may recall when Mr. Williams examined Mr. Fryback early in the trial he went through a lot of detail about how the process worked. We saw that essentially a man stood on a platform up by the pondcrete equipment and watched the mixture come in and tried to figure out when it was the right mixture. And Rockwell may say to you this is not scientific, this is not exact. It was inevitable that [5177] such an inexact procedure would have problems.

There are two problems with that argument as it goes to any claim by Rockwell to have used best efforts. The first is what I said before. They installed, designed the process. Their people monitored the process. They said to DOE in March of 1987 pondcreting is a proven technology.

The second problem is the contrast between the pondcrete produced when Mr. Fryback was foreman, and which he said never went to the pads unless it was concrete hard, and the pondcrete that was later produced under Mr. Teel first and Mr. Tallman later. Mr. Fryback was able to get concrete hard pondcrete blocks using the same methods that Mr. Teel and Mr. Tallman used with the exception of one thing, and that is the reduction of cement. And the reduction of cement was something that Rockwell had in its control. Rockwell didn't have to reduce cement.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch
[Clerk's Stamp Illegible]

Case No. 89-C-1154

UNITED STATES OF AMERICA
ex rel. JAMES S. STONE, AND
UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION,

Defendant.

---

## VERDICT FORM

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We, the jury, upon our oath, unanimously answer the court's questions as follows:

Did the plaintiffs prove by a preponderance of the evidence that the defendant Rockwell International Corporation violated the False Claims Act to get one or more of the following claims under the Department of Energy-Rockwell contracts paid or approved?

Award Fee Period 1 (October 1, 1986 to March 31, 1987)

Yes _____ No ____X____

Award Fee Period 2 (April 1, 1987 to September 30, 1987)
Yes ___X___ No _____
Award Fee Period 3 (October 1, 1987 to March 31, 1988)
Yes ___X___ No _____
Award Fee Period 4 (April 1, 1988 to September 30, 1988)
Yes ___X___ No _____
Award Fee Period 5 (October 1, 1988 to March 31, 1989)
Yes _____ No ___X___
Award Fee Period 6 (April 1, 1989 to September 30, 1989)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 1 (September 30, 1986 to September 30, 1987)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 2 (September 30, 1987 to September 30, 1988)
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 3 (September 30, 1988 to September 30, 1989
Yes _____ No ___X___
Vouchers Accounting for Net Expenditures Accrued 4 (September 30, 1989 to December 30, 1989)
Yes _____ No ___X___

If you answered one or more of these questions "yes," then state what amount of damages the government sustained as a direct result of the violation(s) of the False Claims Act.

$ 1,390,775.00
(amount of ~~damages if~~ any)

On the breach of contract claim, we find for the DEFENDANT.
(plaintiffs or defendant)

If you find for the plaintiffs, then state what amount of damages the government sustained from Rockwell's breach of contract.

$ 0.00
(amount of damages if any)

Date: 4/1/99 /s/ [Name Illegible]
Presiding Juror

*The Denver Post*
June 2, 1988

**Flats waste containers leaking**
Crumbling concrete blocks release toxins, radioactive refuse

By Judith Brimberg
Denver Post Staff Writer

Problems with crumbling concrete blocks of radioactive waste at the Rocky Flats nuclear weapons plant have drawn the ire of state health officials and forced inspection of all 16,000 blocks.

The problem surfaced last week when one block was discovered leaking through its protective package. Instead of being sold concrete, the block reportedly was the consistency of mayonnaise.

Several other blocks appear to be defective, state officials said.

For the past 18 months, Rocky Flats workers have been sealing low-level radioactive sludge and wastewater residue in 1,200-pound blocks for shipment to a Nevada burial site.

At the beginning of the year, however, the ratio of concrete to waste apparently was altered, plant official Kirk McKinley told officials.

After a spot check of 57 blocks turned up eight more defective ones, plant managers promised to inspect the entire inventory of 16,000 blocks, stacked on two asphalt slabs in the northern part of the main facility, north of Golden.

Al Hazle, director of the state Health Department's radiation control division, was critical of the plan for not heeding national standards for mixing concrete, and public health engineer Mike Sattler suggested Rocky Flats may have been remiss in not taking core samples to test how solid the blocks were.

"I understand someone would put his hand on a block to determine how hard it was," Sattler said, describing

inspection procedures. Officials said there is no heath hazard because the waste materials entombed in the blocks – uranium, plutonium, nitrates and acetone – contain only low-level radiation or toxicity.

But Hazle said he still regards the episode to be "of significant magnitude." Sattler said the disintegrating blocks, which are stacked in threes, could pose a physical hazard for plant employees.

The spillage was detected last week following heavy rains and reported immediately to the Colorado health officials and the U.S. Environmental Protection Agency, plant spokesman Pat Etchart said.

At this point, plant executives haven't pinpointed the exact cause although they suspect something went wrong with the concrete curing process.

In the meantime, plant managers are tightening construction and inspection methods and won't ship any defective blocks, Etchart said.

The spillage was washed down with hoses, and the contaminated water flowed down a storm drain and was captured by holding ponds on plant property. Since then, dikes have been built around the asphalt pads to contain any spillage, Etchart said.

**Flats faces check of waste packaging**
**Leak in container found after rains**

By Charlie Brennan
Rocky Mountain News Staff Writer

Rocky Flats crews may have to check up to 16,000 containers holding low-level radioactive sludge after one broke open and officials discovered several others were packaged improperly.

Kirk McKinley, who manages cleanup activities at the Department of Energy nuclear weapons plant 16 miles northwest of Denver, confirmed yesterday that faulty packaging of the waste came to light after one of the 1,200-pound bundles fell and broke open May 23 following several days of rain.

"The Package fell over, and about a 2-inch section of the package ripped open, and a little bit of the contents fell out of it," said McKinley, who added that the contents included "some uranium and nitrate contamination."

Rocky Flats spokesman Pat Etchart said the material's radioactivity level was "very, very low," about "50 parts per billion."

Seven of 57 similar bundles that were subsequently checked showed similar packaging problems.

McKinley said the broken bundle discovered May 23 is one of 16,000 packages containing hazardous materials recovered from contaminated solar ponds used for evaporation of high-nitrate wastes.

All bundles were to have been mixed with concrete in a ratio of about 3.5 pounds of cement to 1 gallon of the sludge. But the ratio in the damaged container, McKinley acknowledged, was closer to 1.8 pounds of cement to 1 gallon of sludge.

"We didn't have enough cement in it," McKinley said. "It appears it didn't set up properly."

The sludge was packaged for shipment to the

Department of Energy nuclear testing site in Nevada for disposal.

The problems show that the packages are not ready to be shipped anywhere, said Al Hazle, director of the radiation control division of the state health department.

"It's not in a form that would allow shipment, and the whole purpose of that was to get in a form where they can ship it," said Hazle. "It didn't achieve an environmentally totally inert form."

McKinley agreed that at least some of the packages can't be shipped in their current condition, but said a broader inspection is needed to find out how many are defective, and why.

"We'll definitely have to inspect all those we've made recently and an opinion on what we find will determine how many more we have to go ahead and check," McKinley said.

"We've been making the packages for about two years now, and the ones that are of concern to us were made over the last few months.

McKinley said he didn't know if the problems would delay shipping of the waste.

Anti-flats activists said the faulty packing underscores the waste problems at the facility.

"I think this is just further substantiates our level of concern about quality control out there and demonstrates our urgent need to have independent monitoring out there from another agency," said anti-Flats activist J. Filcher.

U.S. Rep. David Skaggs, D-Boulder, has introduced legislation calling for an independent regulatory agency to oversee all DOE's nuclear weapons facilities for environmental, health and safety matters.

"There are certainly more serious justifications for that than this incident may suggest, but I think it is of a piece that reinforces the need for an independent objective body to take a look at all of these things," Skaggs said.

Wednesday, June 1, 1988
DAILY CAMERA 3C

**Radioactive concrete oozed out of packing recently at Rocky Flats**

By MARGIE McALLISTER
Camera Staff Writer

After a low-level radioactive concrete block oozed out of its protective packing last week, Rocky Flats officials discovered serious problems with their storage of low-level radioactive waste at the nuclear weapons plant 8 miles south of Boulder.

The spill for the supposedly solid block on the southeast area of Pad 903 at the plant created a meter-wide "hot spot" of low-level radioactivity. The spot has since been covered with asphalt, and a concrete bib now surrounds the 16,000 stored blocks.

Both the Colorado Health Department and Rocky Flats officials say the problem is contained and poses no serious public threat.

"Looking at the radioactive, hazardous-waste standpoint, it's not that dangerous," said Mike Sattler of the state Health Department, who inspected the accident site on May 24. "It would be more dangerous if one of those blocks fell on you."

The blocks weigh 1,200 pounds each and are 40 inches wide and 2 feet high. Called "ponderete," they are composed of cement and sludge from cleanup operations at the plant's contaminated ponds. That sludge contains low-level uranium, nitrates, minute doses of acetone and organic wastes.

The storage problem was discovered May 23 after spring rains, said Rocky Flats spokesman Pat Etchart. Each concrete block is wrapped in plastic, then placed in

cardboard. After the rains, workers realized some of the cardboard boxes were sagging. One had oozed onto an asphalt pad.

"There appears to be a problem with the concrete mixture," Kirk McKinley, who manages cleanup activities at the site, told Rocky Flats Monitoring Committee members Tuesday night. "These blocks are supposed to be solid, but this one (that spilled) had the consistency of mayonnaise."

The ratio of concrete to sludge should be 3.5 pounds of concrete to 1 pound sludge. Instead, 1.8 pounds of concrete was used, McKinley said.

He said plant officials are investigating. The pondcrete is mixed manually, he added.

The problems apparently started in January, according to the state Health Department records. After last week's incident, the plant workers started pulling blocks and testing them. Of the first 57 blocks tested, seven had problems and were not solid.

Rocky Flats workers now must go through all 16,000 stored blocks and check for contents and leaks, Sattler said Tuesday.

6A DAILY TIMES-CALL WEDNESDAY,
JUNE 1, 1988

**Flats workers contain spill**

GOLDEN (AP) – A spill from a low-level radioactive concrete block at Rocky Flats has been contained and poses no serious public threat, health and company officials say.

The Spill occurred last week when the block came out of its protective coating at the nuclear weapons plant near Golden. The spill from the supposedly solid block created a "hot spot" of low-level radioactivity, officials said.

The spot since has been covered with asphalt and a concrete bib now surrounds the 16,000 stored blocks, plant officials said.

"Looking at the radioactive, hazardous waste standpoint, it's not that dangerous," said Mike Sattler of the Colorado Department of Health, who inspected the accident site May 24. "It would be more dangerous if one of those blocks fell on you."

"There appears to be a problem with the concrete mixture," Kirk McKinley, who manages cleanup activities at the site, told Rocky Flats Monitoring Committee members Tuesday night. "These blocks are supposed to be solid, but this one (that spilled) had the consistency of mayonnaise."

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS,

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

---

CIVIL ACTION NO. 89-M-1154

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**JAMES S. STONE'S RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING ENTRY OF JUDGMENT**

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PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

- and -

HARTLEY D. ALLEY, ESQ.
4251 Kipling Street, Suite 130
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(303) 431-8060

Attorneys for Plaintiff James S. Stone

* * *

procedural history of the parties' and the court's prior consideration of the original source issue is warranted.

A. Factual Background

On July 5, 1989, Mr. Stone filed the complaint that initiated this lawsuit against Rockwell under the False Claims Act. More than a year prior to the filing of this suit (and prior to any public disclosure by way of the search warrant or news reports), Mr. Stone and his counsel attended several meetings with agents from the Federal Bureau of Investigation and the Environmental Protection Agency, at which Mr. Stone provided the government with information relating to Rockwell's operations of Rocky Flats and, in particular, certain aspects of its environmental, safety and health record at the Plant which underlie the allegations in this action.

After Rockwell entered its guilty plea in March 1992, discovery in this case first began with Mr. Stone and Rockwell the only parties. In November 1992, Rockwell deposed Mr. Stone for four full days. Relying on that testimony and other discovery, on December 12, 1992, Rockwell filed a motion to dismiss this action for lack of subject matter jurisdiction, arguing that the allegations in this case were based on publicly disclosed information and contending that Mr. Stone was not an "original source" of that information under § 373(e)(4)(A) of the False Claims Act.[3] The parties briefed this issue extensively and submitted supporting factual documentation, including an affidavit of Mr. Stone which demonstrated his direct and

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[3] At around the same time, Rockwell filed two other dispositive motions: a motionf or summary judgment and a motion pursuant to Fed. R. Civ. P. 37(b)(2)(B) for an order limiting the evidence plaintiff can present at trial. Soon after the filing of these motions, Paul, Weiss, Rifkind, Wharton & Garrison appeared in the case on behalf of Mr. Stone. After a response was filed by Paul, Weiss to Rockwell's summary judgment motion, Rockwell withdrew the motion. Rockwell's Rule 37 motion was later denied by the Court.

independent knowledge regarding the matters then at issue in the suit, including the pondcrete, saltcrete and spray irrigation claims that ultimately were tried. Following oral argument, on February 2, 1994, the Court (Carrigan, J.) denied Rockwell's motion, issuing a written opinion in which the Court found that Mr. Stone was an original source of the information upon which the allegations in this action are based – including the allegations regarding pondcrete, saltcrete and spray irrigations – and that this Court accordingly had jurisdiction over the action. Specifically, Judge Carrigan ruled:

> [T[here is evidence that Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments. ...
>
> As a result, I conclude that Mr. Stone possessed direct and independent knowledge of the information on which the allegations [of this action] are based. ...

Opinion at 4-5. Upon Rockwell's request, Judge Carrigan certified this ruling for interlocutory review by the Tenth Circuit. Following additional briefing, on November 16, 1994, the Tenth Circuit declined to hear Rockwell's proposed interlocutory appeal. *From that date forward, this action proceeded through more than four years of discovery, pretrial motions and trial – all without Rockwell ever seeking to revisit Judge Carrigan's findings.*

One year later, on November 14, 1995, the United States moved to intervene in this case pursuant to 31 U.S.C. § 3730(c)(3), on the basis of information provided by Mr. Stone in this action as well as information obtained by the government in its litigation with Rockwell in the Court of Federal Claims. By Opinion and Order dated November 19, 1996, this Court granted the government's motion to intervene. United States ex rel. Stone v. Rockwell Int'l

Corp., 950 F. Supp. 1046 (D. Colo. 1996). In its decision, the Court noted that "what is of paramount importance is the public interest." With the public's interest at the heart of the case, this Court emphasized the importance of the government's participation in the litigation, and in particular, Mr. Stone's contribution in bringing the government into the case. Id. at 1049 ("The declarations filed by John A. Kolar, DOJ-Civil Division trial attorney, persuasively show that information obtained during discovery in the claims court case and made available to him by counsel for Mr. Stone have been important to the decision to intervene.").

At the same time it granted the government's motion to intervene, this Court also denied Rockwell's motion "to enforce" the plea agreement – by which Rockwell had sought to prevent the United States from intervening on the asserted ground that such intervention violated Rockwell's criminal plea agreement. In a direct appeal taken by Rockwell in the criminal case, the Tenth Circuit affirmed this Court's decision on the government intervention. United States v. Rockwell Int'l Corp., 124 F.3d 1194, 1201 (10th Cir. 1997). On April 27, 1998, the Supreme Court denied Rockwell's petition for a writ of certiorari. Rockwell Int'l Corp. v. United States, 118 S. Ct. 1559, 1998 U.S. LEXIS 2826 (1998).

Soon after this Court granted the government's motion to intervene, the government and Mr. Stone jointly filed an amended complaint on December 20, 1996. The amended complaint contained, in its first claim for relief, specific allegations regarding Rockwell's pondcrete, saltcrete and spray irrigation activities at Rocky Flats. The second through fifth claims for relief contained the government's common law claims. And, the sixth claim for relief contained Mr. Stone's FCA claims that the government did not adopt, including his claim regarding plutonium. Rockwell filed its amended answer on January 21, 1997. Later that year, at the May 16, 1997 conference,

this Court severed the plutonium claim so that the case for trial focused on allegations regarding Rockwell's pondcrete, saltcrete and spray irrigation practices.[4]

From the beginning of 1997 until the close of discovery in June, 1998, all three parties – the government, Mr. Stone and Rockwell – conducted extensive discovery in this case. Mr. stone's counsel participated fully in the discovery process, and Rockwell did not object. Indeed, some of the discovery requests propounded to Rockwell (including requests for admission) were made and served by Mr. Stone alone. Not only did Rockwell respond to these discovery requests, Rockwell did not make any objections to the requests on the ground that they had been made by Mr. Stone. In addition, during the more than 100 depositions taken by the parties in the case, Mr. Stone's counsel examined many of the witnesses, and Rockwell's counsel never objected to a single question asked by Mr. Stone's counsel on the ground that Mr. Stone somehow lacked "standing." Mr. Stone's attorneys even attended several depositions of DOE witnesses taken by Rockwell at which DOJ counsel was not present. At these depositions, Mr. Stone's counsel interposed objections to certain of Rockwell's counsel's questions, and Rockwell's counsel permitted her participation and did not object on the ground that Mr. Stone lacked "standing."

Furthermore, at no time during the entire period of discovery following Judge Carrigan's order did Rockwell take any additional discovery relating to Mr. Stone's knowledge regarding pondcrete, saltcrete or spray irrigation. When Rockwell deposed over 55 government witnesses, it did not ask a single question of these witnesses regarding what Mr. Stone may or may not have known about pondcrete, saltcrete or spray irrigation. In short, since Judge Carrigan's February 1994 ruling, Rockwell

[4] Mr. Stone's remaining claim relating to beryllium, also contained in the sixth claim for relief, voluntarily was withdrawn by Mr. Stone.

sought neither additional discovery nor to revisit that ruling.

Nor did Rockwell object on standing grounds to Mr. Stone's various motions to this Court. Most pertinently, during the first part of 1998, Mr. Stone filed a petition seeking the relase of grand jury transcript. Although the government later filed a statement in support of the petition, both the intial petition (on January 15) and the supplemental petition (on May 13) was made *solely* by Mr. Stone. In fact, it was not until the hearing on the petition – an after Rockwell and its former employees filed responses – that government counsel indicated his support for the petition. Neither Rockwell's counsel nor any of the individual intervenors objected to the petition on the ground that Mr. Stone did not have "standing" to be heard in the action. This is despite the fact that Rockwell (and all of the individual intervenors) treated the petition as a very grave matter, and unleashed a virtual flood of separate pleadings and appeals to the Tenth Circuit (which Mr. Stone's counsel argued).

While litigation ensued over the petition to release the grand jury transcripts, the deadline for fact discovery was looming. On April 6, 1998 -- for the first time since November 1992 -- Rockwell requested an additional deposition of Mr. Stone. Because Rockwell already had deposed Mr. Stone for four full days, and because Rockwell had already exceeded its 45-deposition limit, Mr. Stone objected to this deposition absent Rockwell demonstrating a compelling reason for it. In response, Rockwell stated that the purpose of this deposition was to obtain information relating to Mr. Stone's status as an "original source" of the allegations in this case -- the same subject about which Mr. Stone had been deposed for four days in 1992. While Mr. Stone took the position (which plaintiffs reiterate here) that the "original source" issue was properly addressed by Judge Carrigan's February 1994 decision, counsel for Mr. Stone and Rockwell agreed that -- since plaintiffs did not intend to

call Mr. Stone as a witness at trial -- the issue of Rockwell's right to another deposition of Mr. Stone need not be resolved before the trial then scheduled for July 6, 1998. Rockwell never sought to revisit the question after the July 6 trial date was postponed even though Rockwell thereafter sought, and took, several additional depositions.[5]

As trial approached, not only did Rockwell fail to raise the issue, but it effectively conceded Mr. Stone's proper status in its proposed jury instructions. Specifically, Rockwell sought to have the jury instructed that Mr. Stone would be entitled to a share of the recovery on plaintiffs' False Claims Act claim and, to further prejudice the jury against the plaintiffs, that Mr. Stone's state court wrongful discharge claim had been decided against him. Rockwell's proposed jury instructions clearly were inappropriate, having nothing whatsoever to do with any of the issues that the jury had to decide in this case, and provoked several rounds of filings with the Court by plaintiffs and Rockwell. Although Rockwell filed several briefs with the Court on the subject of Mr. Stone's status, Rockwell never renewed its motion to dismiss Mr. Stone from this action or otherwise sought to re-litigate the "original source" issue.

In fact, rather than argue that Mr. Stone was not a proper plaintiff, Rockwell sought to have the jury informed that Mr. Stone would be entitled to a share of the recovery in the event of a plaintiffs' verdict under the False Claims Act. In Rockwell's proposed jury instruction, Rockwell in its own words wrote:

> If a False Claims Act violation is proven in this case, the Court may award Mr. Stone up to 25% of the damages that may be recovered, and any remainder will be paid to the United States government.

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[5] Communications between counsel for Rockwell and counsel for Mr. Stone regarding the deposition of Mr. Stone are documented in a series of correspondence exchanged by counsel. Pursuant to the Court's prior instruction, we have not attached copies of this correspondence but will make them available upon the Court's request.

See Defendant's Instruction No. 1-A ("Preliminary Instruction Before Evidence is Presented"). This position -- whereby Rockwell obviously sought to prejudice the jury against the plaintiffs -- directly conflicts with Rockwell's current position, now that there has been a plaintiffs' verdict, that Mr. Stone and his counsel should get nothing and that judgment should not even enter in Mr. Stone's favor.

Thus, although it had numerous opportunities to do so, at no time from Judge Carrigan's ruling until now did Rockwell ask this Court to dismiss Mr. Stone from this case or restrict in any way his counsel's participation in it. After Mr. Stone filed a response on October 8, 1998 to Rockwell's brief on the proposed jury instructions pertaining to Mr. Stone's role as relator, Rockwell filed a reply brief (on October 28) and a supplemental reply brief (on November 20) but did not file any motion of any kind to dismiss Mr. Stone. In its October 28 Reply, Rockwell raised the issue whether "Mr. Stone and his counsel are allowed to play an active role at the upcoming trial" (at 6), but Rockwell neither sought an answer to this question nor to restrict his counsel's role at trial. Rather than attempt to remove Mr. Stone and his counsel from the case, a few days before trial was to begin, Rockwell and the plaintiffs entered into a Stipulation by which they agreed that the parties would not refer to Mr. Stone's status as relator other than as described by the Court in the juror questionnaire. By so stipulating, Rockwell agreed that the jury would be told that there are *two* plaintiffs in this case, and that Mr. Stone's counsel would participate fully at trial.

Trial commenced on February 22, 1999 and lasted almost six weeks with the announcement of the jury's verdict on April 1, 1999. During the entire duration of the trial, Rockwell did not once object -- even outside the presence of the jury -- to Mr. Stone's role as relator, or to the active participation by Mr. Stone's counsel. Rockwell did not make any motion -- neither written nor oral -- to dismiss

Mr. Stone from this action. In contrast, on two separate occasions during the trial, Rockwell did make motions pursuant to Fed. R. Civ. P. 50 for judgment as a matter of law, which the Court denied. Rockwell first made a Rule 50 motion at the close of the plaintiffs' case-in-chief on March 16, 1999, and then again at the close of the parties' presentation of all of the evidence on March 24, 1999. On neither of these two occasions did Rockwell make any attempt to dismiss Mr. Stone from this action or to limit his counsel's participation in the case.

B. The Purpose, Policy and Plain Language of the False Claims Act Compel Denial of Rockwell's Late-Hour Request

Rockwell argues that, despite the jury's verdict on the False Claims Act claim initiated and pursued by Mr. Stone for ten years, judgment should not be entered in favor of Mr. Stone because, according to Rockwell, he is "not a proper *qui tam* relator." Def. Mem. at 4. But the propriety of Mr. Stone's participation in this litigation was decided by Judge Carrigan in 1994, and this Court should not revisit that ruling at this late stage. Rockwell has made no showing that Judge Carrigan's prior decision was not fully consistent with the structure, language and policy behind the False Claims Act -- because it is.

* * *

[CLERK, U.S. DISTRICT COURT]
[DISTRICT OF COLORADO]
[FILED]
[DATE ILLEGIBLE]
[CLERK NAME ILLEGIBLE]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154_

UNITED STATES OF AMERICA,
ex rel., and JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.,

Defendants.

---

**PLAINTIFF UNITED STATES' SUPPLEMENTAL RESPONSE TO DEFENDANTS' MEMORANDUM REGARDING ENTRY OF JUDGMENT**

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Plaintiff United States of America, by its undersigned counsel, respectfully submits this supplemental response to Defendants' Memorandum Regarding Entry of Judgment dated April 16, 1999 ("Def. Mem.").

## Introduction

On April 16, 1999, Rockwell filed a "Memorandum Regarding Entry of Judgment," in which Rockwell argued, *inter alia*, that judgment on the jury's False Claims Act ("FCA") verdict should be entered solely in favor of the United States, and not in favor of relator James S. Stone on the ground of the "public disclosure/original source" provision of the *qui tam* statute, 31 U.S.C. § 3730(e)(4). The government opposes Rockwell's position that judgment should not be entered in favor of Mr. Stone as well as the United States, and submits this Supplemental Response to explain the basis for its position that judgment should be entered in favor of both plaintiffs.[1]

The government states as follows:

1. On February 2, 1994, this Court (by Carrigan, J.) issued an Order ("1994 decision") denying Rockwell's motion to dismiss this action for lack of subject matter jurisdiction and holding that relator James S. Stone satisfied the "original source" requirement set forth its 31 U.S.C. § 3730(e)(4)(B). The Court described the "gravamen" of Mr. Stone's suit as being a claim that Rockwell concealed from DOE violations of the environmental, safety and health laws ("ES&H") in order to continue receiving payments of award fees and other monies from the government. Order at 2.

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[1] The government's Response To Defendants' Memorandum Regarding Entry Of Judgment, filed May 4, 1999 (which memorandum may have been mistakenly dated May 5, 1999), addressed other issues raised by Rockwell in its Def. Memo. The government was unable to include a discussion of its views on the "public disclosure/original source" issues in its initial Response, because those issues were still being reviewed within the Department of Justice. As explained in the accompanying motion for leave to file this Supplemental Memorandum, the government respectfully submits that the Court's consideration of the government's position on these issues will materially assist the Court in reaching a just resolution of those issues, and, therefore, we seek leave to submit this further memorandum prior to the hearing on judgment issues scheduled for May 7, 1999.

2. Now, after the government, assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys, has succeeded at trial, Rockwell asks the Court to revisit and reverse its 1994 decision on this issue. Rockwell undoubtedly does so in order to avoid having to pay attorneys' fees and other litigation costs and expenses incurred by Mr. Stone in the course of his effort to prosecute his claim in cooperation with the attorneys for the United States. Rockwell has failed to raise grounds that warrant reconsideration of the 1994 decision.

3. There has been no pertinent change in the law of the Tenth Circuit since the 1994 decision such as to warrant the Court's reconsideration of that ruling.

4. Nor would any injustice to Rockwell result from the Court's refusal to revisit its 1994 decision.

5. Rockwell's contention that the case that plaintiffs presented at trial was somehow a "different case" than the one pleaded by Mr. Stone in his complaint such as to require the Court to reconsider the 1994 decision is wholly without merit.[2] The allegations actually tried clearly came within the gravamen of Mr. Stone's complaint, as defined by Judge Carrigan in the 1994 decision. From February 22, 1999 through April 1, 1999, this action was tried to a jury *inter alia* on the theory that Rockwell used false statements to obtain the payment of false and fraudulent claims for award fees. The jury found that Rockwell did in fact submit false statements to obtain payment of its award fee claims for the six-month time periods ending September 20, 1987, March 31, 1988, and September 30, 1988.

6. Thus, the narrowing that occurred in this case, done at the government's behest for tactical litigation reasons, did not transform the case into a "different case," it

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[2] For example, at page 13 of Def. Memo., Rockwell states that the Court should reverse its 1994 decision on the ground that the case presented to the jury "bear[s] virtually no resemblance to Mr. Stone's FCA claims as set forth in his July 1989 Complaint."

merely made it a more finely-honed case, a result that advantaged Rockwell as well, because Rockwell was able to focus its defense at trial on narrower allegations. Rockwell's argument that the Court should revisit its earlier ruling on this ground is specious.

7. Finally, the government notes that the question of whether a particular relator is or is not an "original source" is one which affects the government's interests, and the government itself sometimes raises this issue when the government concludes that a relator fails to meet the requirements in 31 U.S.C. § 3730(e)(4). In this case, the government has determined that it will not challenge Mr. Stone's status pursuant to 31 U.S.C. §3730(e)(4), and, for the reasons stated above, the Court should enter judgment on the jury's FCA verdict in favor of both plaintiffs.

Dated: May 6, 1999.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

THOMAS L. STRICKLAND
United States Attorney

STEVEN D. TAYLOR
Assistant United States Attorney

/s/ Michael F. Hertz
MICHAEL F. HERTZ
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JA-572

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Attorneys for the
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 C 1154

UNITED STATES OF AMERICA, ex rel.,
and JAMES S. STONE,

Plaintiffs,

vs.

ROCKWELL INTERNATIONAL
CORPORATION, a corporation

Defendant.

---

**PLAINTIFF JAMES S. STONE'S FIRST SUPPLEMENTAL RESPONSES TO DEFENDANT'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

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Plaintiff James S. Stone, by his attorneys Hartley David Alley; Buchanan, Gray, Purvis & Schuetze; McDermott, Hansen & Reilly; and, Breit, Best, Richman and Bosch, P.C., hereby submits the following Supplemental Responses to Defendant's First Interrogatories and Requests for Production of Documents:

SUPPLEMENTAL RESPONSES TO INTERROGATORIES

Supplemental Response to Interrogatory No. 1:
(Re: Beryllium Machining)

a. Beryllium machining which produced airborne beryllium particles in excess of OSHA and NIOSH standards, and TLV's for beryllium as adopted by D.O.E.

b. Presently unknown. Stone's earliest work concerning airborne Be commenced during 1984 and was ongoing until approximately the date of his termination in 1986.

c. Pending the completion of discovery, Plaintiff cannot identify all documents. However, Stone's documents numerically numbered 310 - 311, 521, 522 - 537, 538 - 540, 548, 587 - 588, 591 - 592, 595 - 596, 598, 601, 603, 610 - 611, 619 - 621, 685, 701 - 706, 708 - 711, 712, 713, 735 - 736, 737 - 739, 740, 742, 744, 762,

* * *

concerning glove-box dump valves in the 700 Complex.

Supplemental Response to Interrogatory No. 11:

Stone contends that the government is entitled to recover all sums to which the government is entitled pursuant to 31 U.S.C. § 3729, et seq. denominated "award fees" together with those denominated "allowable costs," "fixed fees," "base fees," and "goal achievement objectives" as well as all other amounts Rockwell received as compensation under the Rockwell - DOE contracts arising from or related to sums paid to Rockwell by the government on matters as to which a violation of 31 U.S.C. § 3729, et seq. is established, and furthermore, for a sum representing the government's consequential damages as a result of defendant's conduct. Review of the extensive contract documents is ongoing and, when capable of making Plaintiff's damages clearer, Plaintiff will supplement this response further.

Supplemental Response to Interrogatory No. 18:

Stone does not contend that he has direct and independent knowledge as to any category of problem or

method of conducting operations other than those concerning which he has direct and independent knowledge obtained during the course of his employment. As to such matters, Stone contends that to the extent that Rockwell's conduct was the same prior to his employment, and/or that such conduct remained essentially unchanged following plaintiff's termination with Rockwell, that Stone has direct and independent knowledge of such ongoing violations within the meaning of 31 U.S.C.(e)(4)(B). The subject matter concerning which Stone has direct and independent knowledge is set forth throughout his responses to defendant Rockwell's First Set of Interrogatories.

Supplemental Response to No. 19:

See Supplemental Response to Defendant's Interrogatory No. 18. To the extent that Rockwell engaged in the same or similar conduct and submitted claims prior to Stone's employment or following Stone's termination of the same or similar nature to those false claims submitted during Stone's employment, Stone contends he does have "direct and independent knowledge" of such false claims within the meaning of 31 U.S.C. §3730(e)(4)(B).

Supplemental Response to Interrogatory No. 23:

With the understanding that plaintiff has not conducted a meticulous inspection of the thousands of pages of documents produced to date to determine whether any overlap exists, and further subject to the understanding that the context of the various documents produced may conceivably indicate to the contrary, those documents produced to date by Stone which bear Stone's handwritten numerical numbering in the lower right-hand

* * *

DATED this 3rd day of April, 1992.

Hartley D. Alley, Esq.
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MCDERMOTT , HANSEN,
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/s/ William R. Gray
William R. Gray

ATTORNEYS FOR
PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel. JAMES S. STONE, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | 89 M 1154 |
| ROCKWELL INTERNATIONAL CORPORATION, et al., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF ORAL ARGUMENT
ON JUDGMENT ISSUES

* * *

I propose then to enter the judgment that says that

123

the plaintiffs shall recover this amount, and I haven't yet determined the civil fine aspect of it, but it's my understanding of the statute here that the division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone, and as of now, as far as I'm aware, there's no dispute about that. They are not quarrelling about it and, therefore, it's my view that it isn't any of this Court's business as to what that division should be.

I'm of the view that the defendant has no stake in that quarrel. Defendant has to pay, and how the government and Mr. Stone divide it up is up to them. If there were to be a dispute, it would be up to me, but I'm not here to generate disputes that don't exist. So I don't think that question is at all here.

* * *

[FILED]
[UNITED STATES DISTRICT COURT
[DENVER, COLO]
[JUNE 10 1989]
[JAMES R. MANSPEAKER]
[_____ CLERK]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE, AND UNITED STATES OF AMERICA,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION and BOEING NORTH AMERICAN, INC.,

Defendants.

---

**ORDER RESERVING RULING ON MOTIONS FOR FEES AND EXPENSES**

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On May 27, 1999, the plaintiff James S. Stone filed a motion for attorneys' fees and expenses. On the same date, predecessor counsel for James S. Stone filed a submission of predecessor counsel's fees and costs. Because the court anticipates appeals in this matter which may well affect the determination of these motions, it is

ORDERED that ruling on these motions for fees and costs is reserved until after determination of any appeals.

DATED: June 10th, 1999

BY THE COURT:
/s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-1351, 99-1352, and 99-1353

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

Plaintiffs-Appellees,

v.

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants.

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**APPELLANTS' OPENING BRIEF**

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* * *

## JURISDICTIONAL STATEMENT

District Court's Jurisdiction. On July 5, 1989, plaintiff-appellee James S. Stone ("Stone") brought this lawsuit against defendants-appellants Rockwell International Corporation and Boeing North American, Inc. (jointly, "Rockwell") under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33 (the "FCA"). (*See* Attachment A.) Seven years later, in 1996, the United States of America (the "government") intervened in this action under Section 3730(c)(3) of the FCA. Stone and the government (jointly, "plaintiffs") contend that the district court had jurisdiction over their claims under 28 U.S.C. § 1345 and 31 U.S.C. §§ 3729-32. Rockwell contends that the district court lacked subject matter jurisdiction over Stone's

claims because Stone is not an "original source" as required by Section 3730(e)(4) of the FCA.

* * *

**E. Rockwell's December 1992 Motion To Dismiss for Lack of Jurisdiction**

In December 1992, Rockwell filed a motion to dismiss Stone's complaint for lack of subject matter jurisdiction, on the ground that Stone was required to, but did not, satisfy the FCA's "original source" requirement. (133-35.) In response to Rockwell's motion, Stone conceded that his FCA allegations were "'based upon the public disclosure of allegations in ... a criminal hearing ... or from the news media,'" and that he was therefore required to be an "original source." (270, *quoting* 31 U.S.C. § 3730(e)(4)(A).) In an attempt to satisfy this requirement, Stone submitted to the court an Affidavit dated February 27, 1993—*i.e.*, three and one-half years after Stone's July 1989 complaint and Disclosure Statement, and one year after the March 1992 plea agreement and sentencing memorandum. (290-310.)

* * *

## DISCUSSION

Stone conceded, and the trial court ruled, that the FCA allegations set forth in Stone's original complaint "involve[d] incidents that were widely covered in the news media." (*See* 270 & 892.) Accordingly, under Section 3730(e)(4)(A) of the FCA, the court lacked jurisdiction over Stone's claims unless Stone was an "original source" of the information on which his allegations were based.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 991351, 99-1352, and 99-1353

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

Defendants-Appellants/Cross-Appellees..

---

**APPELLEE/CROSS-APPELLANT JAMES STONE'S OPENING/RESPONSE BRIEF**

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* * *

B. The Trial Court's 1994 Ruling That Mr. Stone Is An Original Source Was Correct

Notwithstanding its lack of standing, Rockwell's "original source" challenge is without merit, as the Government and two trial judges have concluded. The "original source" component of the FCA's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)(A), requires a relator to possess direct and independent knowledge of the information upon which his allegations are based. United

States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 553 (10th Cir. 1992).[15]

* * *

[15] Although Mr. Stone demonstrated his original source status over all of his FCA allegations, contrary to Rockwell's statement, there was never a finding or concession that the pondcrete allegations had in fact been publicly disclosed prior to the filing fo Mr. Stone's complaint. (App. 270)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

---

UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

---

CIVIL ACTION NO. 89-M-1154

---

**PLAINTIFF JAMES S. STONE'S MOTION FOR A FINDING ON LIMITED REMAND THAT MR. STONE MADE THE REQUISITE DISCLOSURES TO THE GOVERNMENT PRIOR TO FILING THIS ACTION**

---

Plaintiff James S. Stone, by his counsel, respectfully moves this Court for an Order, in accordance with the Tenth Circuit's March 4, 2002 Decision and Order on Rehearing, finding that Mr. Stone made the requisite disclosures to the Government prior to filing this action as required by 31 U.S.C. § 3730(e)(4)(B).

In its Decision and Order on Rehearing, the Tenth Circuit denied Rockwell's petition for rehearing *en banc* and affirmed the judgment and rulings of this Court with a limited remand on the narrow question as to whether Mr. Stone had satisfied the False Claims Act's "pre-filing

disclosure" requirement, 31 U.S.C. § 3730(e)(4)(B). The Tenth Circuit, in accordance with this limited remand, has requested the submission of a supplemental record with this Court's findings and conclusions on the pre-filing disclosure issue.

As set forth more fully in the accompanying memorandum in support of this Motion, the present record demonstrates that Mr. Stone voluntarily provided to the Government, prior to filing his False Claims Act lawsuit on July 5, 1989, the information upon which his allegations in this action were based. This Court can therefore make the requisite findings on the basis of the present record, the pertinent portions of which are discussed in the accompanying memorandum and are attached to the accompanying Affidavit of Maria T. Vullo, Esq.

WHEREFORE, Mr. Stone respectfully requests that the Court (1) enter an order, with accompanying findings and conclusions, reaffirming that Mr. Stone complied with the FCA's pre-filing disclosure requirement, and (2) certify such order to the Tenth Circuit for final disposition.

In accordance with D. Colo. Local Rule 7.1(A), Mr. Stone's counsel has conferred with counsel for Rockwell regarding this motion. Rockwell's counsel has stated that Rockwell does not consent to the relief sought by this Motion, and has also declined to agree to a briefing schedule for this Motion. Accordingly, Mr. Stone also respectfully requests that the Court enter an Order providing that the new Local Rules of this Court, effective April 15, 2002, govern the briefing schedule for this Motion – that is, under D. Colo. Local Rule 7.1 (C), Rockwell shall have 20 days to file its response to this Motion, and Mr. Stone shall have 15 days thereafter to file his reply.

Dated: April 3, 2002

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
By: /s/
Robert E. Montgomery, Jr.
Maria T. Vullo
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
-and-
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Wheat Ridge, Colorado 80033
(303) 431-8060
Attorneys for Plaintiff James S. Stone

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL INTERNATIONAL CORPORATION AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

---

CIVIL ACTION NO. 89-M-1154

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# PLAINTIFF JAMES S. STONE'S MEMORANDUM IN SUPPORT OF MOTION FOR A FINDING ON LIMITED REMAND

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Plaintiff James S. Stone, by his counsel, respectfully submits this memorandum in support of his Motion, in accordance with the Tenth Circuit's March 4, 2002 Order on Rehearing which denied the petition for rehearing *en banc* filed by defendants Rockwell International Corporation and Boeing North American, Inc. ("Rockwell") and ordered a limited remand to this Court.

## The Issue on Remand

The narrow issue before this Court on remand is whether the information provided by Mr. Stone to the Government before he filed this action satisfied the "pre-filing disclosure requirement," which is the second prong of

the "original source" test set forth in Section 3730(e)(4) of the False Claims Act ("FCA"). The "original source" provision of the FCA, Section 3730(e)(4)(B), imposes two distinct requirements. First, a *qui tam* plaintiff must show that he has direct and independent knowledge of the information on which his allegations are based. Second, he must show that he provided that information to the Government prior to filing suit. The Tenth Circuit found that Mr. Stone had met the first requirement, by demonstrating direct and independent knowledge that Rockwell's pondcrete manufacturing process was defective, and that Rockwell prohibited its employees from disclosing such environmental problems to the Government. The sole issue on remand is whether Mr. Stone provided this information to the Government before filing suit, thereby satisfying the second element of the original source test.[1]

This issue can be readily resolved upon the existing record.[2] This Court has already twice concluded – in 1994 and 1999 – that Mr. Stone is an "original source." In 1994, upon an extensive evidentiary record, this Court held that Mr. Stone had met the pre-filing disclosure requirement. The United States also agreed with the Court's finding of "original source," and filed a statement of support in 1999 that Mr. Stone is a proper relator in this FCA action. In 1999, this Court "expressly adhered" to the Court's earlier

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[1] The Tenth Circuit also remanded for a determination as to whether Mr. Stone satisfied the pre-filing disclosure requirement as to spray irrigation and saltcrete. As we show below, Mr. Stone plainly met this requirement with respect to his spray irrigation claim. Mr. Stone does not contend that he provided information relating specifically to saltcrete to the Government prior to filing suit.

[2] In its decision, the Tenth Circuit recognized that there is "considerable material" in the existing record on the issue, but noted that this Court had not made it the subject of an explicit finding. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 803 (10th Cir. 2002).

finding. In neither instance did Rockwell dispute this element of the Court's rulings.

Rockwell did not even raise this pre-filing disclosure issue until its Tenth Circuit rehearing petition. Throughout the ten years since it first raised the "original source" issue, Rockwell has always conceded that the information in Mr. Stone's possession was provided to the Government before the filing of the FCA action. Rockwell has argued only that the *type and amount* of Mr. Stone's information did not satisfy the "direct and independent" knowledge requirement, which constitutes the first prong of the statutory test.

When the Tenth Circuit emphatically rejected Rockwell's "first prong" original source argument,[3] however, Rockwell seized upon the recent decision in *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001) as a peg on which to hang a last-ditch shift of focus to the pre-filing disclosure requirement. By misrepresenting the record in its Petition for Rehearing, Rockwell was able to create uncertainty as to the sufficiency of this Court's factual findings on this previously uncontested issue. As will be demonstrated below, Rockwell continues to pursue a strategy of delay and obfuscation that has imposed substantial burdens on both the relator and the courts. Such conduct should no longer be tolerated.

This Court's task on remand can be performed by reviewing the existing record in the context of the Tenth Circuit's opinion, and making explicit the Court's prior implicit finding that Mr. Stone satisfied the statutory pre-

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[3] *See United States ex rel. Stone v. Rockwell Intl Corp.*, Nos. 99-1351, 99-1352, 99-1353, 2001 WL 1117107, at *8-*12 (10th Cir. Sept. 24, 2001) (withdrawn from publication).

filing disclosure requirement. By this motion, Mr. Stone respectfully requests that this Court make such findings so that Rockwell's appeals will be finally concluded.

* * *

Nos. 99-1351; 99-1352; 99-1353

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
JAMES S. STONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendants-Appellants/Cross-Appellees.

---

**PLAINTIFF-APPELLEE/CROSS-APPELLANT JAMES S. STONE'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL**

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* * *

**Procedural Background**

On March 4, 2002, this Court remanded to the District Court to make "findings of fact and conclusions concerning the issue of disclosure prior to filing of this action in accordance with the False Claims Act, concerning the saltcrete, pondcrete and irrigation matters and any further proceedings in the district court which the District Judge deems necessary in connection therewith." *United States ex*

*rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 792 (10th Cir. 2002).[1]

In accordance with the Tenth Circuit's Order, Mr. Stone filed a motion below seeking findings that he had made the requisite disclosures to the Government before filing suit. In response, Rockwell submitted opposition papers, which included additional materials that were not previously before either this Court or the District Court. In particular, Rockwell submitted an affidavit of Kenneth A. Thompson, a former member of the FBI with no personal knowledge whatsoever of the facts of this case. Utilizing the theory espoused in that affidavit, Rockwell argued that, because the available FBI 302 reports contained certain information with regard to Mr. Stone's discussions with the Government prior to the filing of this action, the District Court should infer from alleged "omissions" in those reports that other information was not provided orally to the Government.

In his reply dated May 8, 2002, Mr. Stone objected to Mr. Thompson's affidavit, and further objected to any consideration by the District Court of Rockwell's "omissions" theory based on the FBI 302 reports, on the ground that to do so would be to accept hearsay evidence that lacks probative value. Knowing that the facts completely refute Rockwell's position, Mr. Stone also expressly reserved the opportunity to submit additional evidence that was not in the current record, in the event the District Court were to consider Rockwell's "omissions" theory and the truth of the matters stated (or not) in the 302 reports. Specifically, Mr. Stone's Reply stated:

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1 Citations to "App." and "Supp. App." are to the record before this Court on the main appeal. The entire record on appeal (excluding trial transcripts) consists of six volumes of the Appellants' Appendix ("App."), one volume of Appellee's Supplemental Appendix ("Supp. App."), and one additional volume filed by Appellants with their reply papers. Citations to "Second Supp. App." refer to the accompanying Appellee's supplemental appendix containing submissions on remand and a copy of the November 25, 2002 oral argument transcript below ("Tr.").

Relying on inappropriate personal attacks and innuendo, Rockwell asks this Court to ignore Mr. Stone's affidavit and the other record evidence, and rely solely on what is not stated in FBI reports prepared by an FBI Agent who has never testified in this action and on a newly-devised "expert" affidavit submitted to this Court for the first time on this motion. (Stone Reply at 20)

Rockwell's contention that the unsworn Lipsky reports constitute a "clear" and "complete" record of Mr. Stone's pre-filing disclosures is entirely flawed. As the reports on their face make plain, they do not even purport to be verbatim accounts of the meetings – and their short length proves this point. For instance, Lipsky's memo of the February 17, 1988 meeting expressly indicates that the meeting lasted 3 full hours and 50 minutes, but Lipsky's memo itself consists only of 3 1/2 short pages. A transcript or verbatim account of a meeting lasting close to 4 hours should obviously be much longer. (Stone Reply at 21)

Mr. Thompson's affidavit was not part of [the record submitted to the Tenth Circuit]. Rockwell also has not satisfied disclosure requirements with respect to this new "expert" witness identified after trial. Should the Court nonetheless consider Mr. Thompson's affidavit, Mr. Stone respectfully requests the opportunity for discovery of Mr. Thompson and to submit any additional evidence necessary to respond to Rockwell's extra-record contentions. (Stone Reply at 26, n. 9) (Emphasis added)

The District Court held oral argument on November 25, 2002. On at least two occasions during that argument, counsel for Mr. Stone stated that Mr. Stone was fully prepared to submit additional evidence regarding his pre-filing disclosures:

> MS. VULLO: ... We think that the record before you, and this hearing, is sufficient. However, if Your Honor thought that there were some issues, we obviously don't want to lose subject matter jurisdiction over Mr. Stone's claim, and if [there] are any issues. ... I'd be happy to provide.

(Tr. 21) (The District Court stated that it did not have any questions "excepting what was in those 200 pages," and counsel for Mr. Stone proceeded to answer that question.)

> MS. VULLO: And, again, based upon what we have here, we think Your Honor can make those findings, although if Your Honor had any questions, we'd be happy to provide whatever additional information.

We do object strenuously to the FBI agent expert affidavit.
(Tr. 23)

After counsel for the parties answered the District Court's questions regarding the FBI 302 reports and the Thompson affidavit, the District Court stated its intention to disregard the Thompson affidavit, *as well as its underlying premise that 302 reports are complete and accurate accounts*. Importantly, in this regard, the District Court stated:

> Incidentally, on this narrow point of whether I should consider Mr. Thompson's affidavit, I'm not going to consider it, simply because I think it's speculative. *I've been around a lot of 302s and I've found a good many times when 302s did not encompass all that was said, and sometimes intentionally so.*

(Tr. 38) (emphasis added) Given this statement by the District Court, Mr. Stone did not submit his additional evidence at that time concerning the 302 reports.

On December 17, 2002, however, the District Court issued its order on remand, finding that Mr. Stone provided *written* disclosures to the Government prior to filing suit, but indicating that the record was unclear as to whether, and to what extent, Mr. Stone's information was *orally discussed* at his pre-filing meetings with the Government. *See* December 17, 2002 Order ("Findings") at 5-6. The District Court changed course with respect to the 302 reports, stating: "it is also fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the ponderete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports." (Findings at 5-6.)

As a result, on December 23, 2002, Mr. Stone filed a Motion for Reconsideration and to Supplement the Record, offering additional sworn affidavits from witnesses with personal knowledge—Mr. Stone and his counsel Hartley David Alley regarding what in fact was *orally discussed* at Mr. Stone's meetings with the Government in 1986-1988 prior to the filing of this suit in 1989. (Attached hereto as Exhibits A and B are true and correct copies of the Affidavit of James S. Stone, sworn to December 23, 2002 ("Stone Supp. Aff."), and the Declaration of Hartley David Alley, sworn to December 23, 2002 ("Alley Decl.")).

Rockwell filed its opposition on January 13, 2003. In its response, Rockwell conceded that the supplemental affidavits contain facts satisfying the pre-filing disclosure requirement, and merely made procedural arguments as to why Mr. Stone's affidavits should be rejected as "untimely." Moreover, in its opposition, Rockwell tellingly did not request an evidentiary hearing or the opportunity to cross-examine Mr. Stone or Mr. Alley. (Second Supp. App. 81-83) On the contrary, Rockwell argued that further hearings would be futile given the passage of time and sought instead

to attack Mr. Stone's credibility on paper. (Second Supp. App. 81)

Without waiting for Mr. Stone to file a reply (which was not due until January 28, 2003), the District Court, by order dated January 21, 2003, denied Mr. Stone's motion to supplement. In its order, the District Court based its decision solely on the ground that Rockwell would be "prejudiced" unless given the opportunity to cross-examine Mr. Stone and Mr. Alley and that such an opportunity "would unduly prolong these proceedings."[2]

As discussed below, there can be no "prejudice" to Rockwell by this Court's consideration of clearly relevant evidence on the issue before this Court. The District Court's reasoning that such consideration would "unduly prolong the proceedings" is wholly without merit. Surely, Rockwell's persistent effort to re-litigate the original source issue cannot be used by Rockwell as a basis for a claim of prejudice to Rockwell, particularly here, where Rockwell seeks to reverse the 1999 judgment in favor of Mr. Stone. Mr. Stone's first pre-filing meeting with the Government occurred in 1986—seventeen years ago. Throughout the years since that time, Mr. Stone has diligently prosecuted this action against Rockwell, in nearly fifteen years of litigation, culminating in a jury trial finding of fraud against Rockwell. On this matter of subject matter jurisdiction, this Court clearly has the authority to supplement the record and consider the supplemental affidavits. Mr. Stone's motion accordingly should be granted.

* * *

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[2] Although the District Court, on January 24, 2003, transmitted a supplemental record to this Court, it included neither the two affidavits attached to Mr. Stone's motion below, nor Rockwell's opposition to that motion.

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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Civil Action No. 89-M-1154

UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,
PLAINTIFFS,

v.

ROCKWELL AUTOMATION, INC. AND BOEING NORTH AMERICAN, INC.,
DEFENDANTS.

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## AFFIDAVIT OF JAMES S. STONE

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STATE OF COLORADO )
) ss
COUNTY OF )
JEFFERSON

JAMES S. STONE, being sworn, states:

1. I am the *qui tam* plaintiff in this action. I filed this action in July 1989. I am now 78 years of age. I was unable to attend the November 25, 2002 hearing in this action because I was needed at home to assist my wife who had just returned from the hospital two days earlier after suffering a life-threatening blood clot in her lungs.

2. I understand that, on December 17, 2002, the Court issued "Findings and Conclusions on Limited Remand" with respect to the question of the information that I provided to the government prior to the filing of this

action. I understand further that, in issuing such findings, this Court relied on documents prepared by government agents as to two meetings that I had with the government, on June 25, 1987 and February 17, 1988. The Court stated that the agents' reports of those meetings did not mention "pondcrete," which suggested that I did not attach any importance to this potential problem.

3. As I stated in my February 27, 1993 affidavit, my best memory at that time was that I first met with representatives of the United States government about Rockwell's environmental practices and fraud in the summer or fall of 1986, and thereafter met with government agents on numerous other occasions. (App. 306, ¶ 31) I also stated in my 1993 affidavit that the FBI agent reports of my meetings with the government did not describe all of the information that was discussed at those meetings, and there were conversations that I had for which there was no written report. (App. 307, ¶ 33)

4. At the time that I filed my affidavit in 1993, the government had not yet intervened in the case, and Rockwell had filed a motion addressed to my original complaint asserting that I did not meet the "original source" requirements of the False Claims Act. Rockwell's motion was addressed principally to the extent of my direct and independent knowledge, and I submitted an affidavit in response to Rockwell's motion and the arguments made therein.

5. I now understand that, over ten years later, in *King v. Hillcrest Healthcenter, Inc.*, 264 F.3d 1271 (10th Cir. 2001), the Tenth Circuit has ruled that the pre-filing disclosure statement alone is insufficient to satisfy the second prong of the "original source" test, with regard to a relator's pre-filing disclosures.

6. The events in question took place over 15

years ago. I am now 78 years old and have progressively become more forgetful, particularly about details and dates. I do not have perfect memory of the events of 1986, 1987 and 1988 and in particular, I do not have specific memory of every subject that was discussed in any particular meeting or in any particular telephone conversation that I had with the government before I filed this action in 1989. I do recall a lengthy meeting with Mr. Fimberg, Mr. Lipsky and my attorney Hartley Alley. My memory was much better in 1993 when I submitted my prior affidavit in response to Rockwell's motion seeking dismissal of my case. It was not until this year, however, that the Tenth Circuit decided the *King* case, and my pre-filing disclosures became an issue.

7. To the best of my recollection, I provided the government agents in 1986, 1987 and 1988 with the information I possessed regarding pondcrete and spray irrigation. I never once withheld any information from the government. I volunteered a significant amount of information with regard to Rockwell's environmental practices and its failure to report its environmental violations to the Department of Energy. I was fully forthcoming and honest in all of my meetings and telephone conversations with the government. I answered all of their questions. The agents were interested in some topics much more than others, however, and I focused my efforts to provide information on the topics in which they were most interested.

8. In addition, I provided the government with substantial documentation in my possession with regard to Rockwell's deficient environmental practices and fraud. Those documents included:

- Doc. No. 276 – an Engineering Order dated October 13, 1982, containing my review and comments on the designs for solar evaporative pond sludge removal;

- Doc. No. 4 – an Engineering Calculation Sheet, dated December 1, 1980, entitled "Nitrate Waste Irrigation," containing my review and comments on the design for the nitrate waste irrigation system;
- Doc. No. 410 – an internal memorandum to a Rockwell manager, dated March 20, 1984, describing Rockwell's ground water control system as a "latent time bomb;"
- Doc. No. 790 – a listing of Functional Performance Areas (FPA's) for Rockwell with award fee grading area marked; and
- Doc. No. 789 – an excerpt from a Rockwell internal letter concerning award fees which states that "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPA's."

True copies of these documents are attached hereto as Exhibit A.

9. The above documents were provided to the government prior to my filing of the Disclosure Statement in July 1989. To the best of my belief, I provided these documents to Mr. Lipsky in March 1988. Prior to that time, I had personally numbered each of the documents that I provided to Mr. Lipsky, in my own handwriting, in the lower right-hand corner of each document. The documents referenced above include my handwritten numbering, as indicated in the attached Exhibit A. In March 1988, my attorney Hartley Alley and I reviewed the documents to be provided to Mr. Lipsky, and I personally delivered the documents to Mr. Lipsky.

10. To the best of my recollection and belief, I discussed with government investigators information underlying the pondcrete and spray irrigation claims in this action. Such information was based upon my direct and independent knowledge. As to the pondcrete claim, I discussed that Rockwell was utilizing a deficient design for

the mixing of cement and sludge from wastes at the Rocky Flats Plant. At the time that I first examined this issue in 1982, the word "pondcrete" had not yet been created, but the concept was in development. As I stated in my 1982 Engineering Order I believed that the design was deficient and would lead to hazardous environmental conditions. My 1982 Engineering, Order relates to what later became known as "pondcrete." I communicated this information to government investigators in my meetings and telephone calls with them in 1986, 1987 and/or 1988.

11. With respect to spray irrigation, to the best of my knowledge and belief, I also discussed with government investigators in 1986, 1987 and/or 1988 the subject of Rockwell's improper "irrigation" practices at the Rocky Flats Plant with respect to the disposal of liquid wastes that could damage the ground water and surface waters surrounding Rocky Flats. I cannot specifically remember at this time the specific meeting or meetings at which this topic was discussed, but it was discussed in my pre-filing meetings with the government agents. In fact, in the years 1986-1988, I was specifically focused on the spray irrigation problems at Rocky Flats, as that was an issue in my state court case against Rockwell, which was filed on August 20, 1986. As the Court noted in its December 17, 2002 Order, I specifically discussed spray irrigation matters in my state court complaint, and provided a copy of my state court complaint to government investigators in March 1988. (The state court complaint filed August 20, 1986 is attached as Exhibit P to my 1993 Affidavit.)

12. During all of my meetings and telephone conversations with government investigators, my entire purpose was to provide the government with information from which the government could investigate Rockwell's crimes at the Rocky Flats Plant. I did not believe at any time that I had the obligation to stress any particular fact or issue to the government, but rather to provide information

in response to their questions. I understood at the time that the government was investigating Rockwell's environmental practices and I tried to answer any and all questions that they had. I also provided them with the documents in my possession, which included documents on pondcrete and spray irrigation. No one ever told me that the FBI 302 reports could be used in the future to dismiss any False Claims Act action that I might file against Rockwell as a *qui tam* plaintiff. The government investigators never once indicated that they prepared reports in order to set forth every fact that I disclosed to the government in those meetings. In fact, I believed at the time that any notes that the government agents took were protected by government secrecy rules. Had I believed that Rockwell could later use these reports to argue that I failed to provide certain information to the government, I would have made sure to keep a verbatim account of the meetings.

13. For the foregoing reasons, I respectfully request that the Court grant my motion to reopen these proceedings and consider this affidavit and the declaration of Hartley David Alley, Esq. I further respectfully request that the Court conclude that I made the requisite pre-filing disclosures to the government as required by the False Claims Act. I am prepared to answer any questions that the Court might have with regard to these matters, to the best of my memory and belief at the present time.

/s/ James S. Stone
James S. Stone

Sworn to before me this 23rd
day of December, 2002

[Notary Public Seal]

/s/ Jamaine A. Edholm
Notary Public

My Commission Expires 4/23/03

# EXHIBIT A

Stone 10-13-82

# ENGINEERING ORDER

**TYPE OF ACTION**

| IGINEERING | REVIEW | FINAL |
|---|---|---|
| RAWINGS | ☐ | ☐ |
| CONCEP. DES. REPORT | ☐ | ☐ |
| DESIGN CRITERIA | ☒ | ☐ |
| REQUEST FOR DIRECTIVE | ☐ | ☐ |
| OTHER ( ) | ☐ | ☐ |
| PROCUREMENT SPECS. | ☐ | ☐ |
| DESIGN DOC.-TITLE I/II | ☐ | ☐ |
| PROCUREMENT SPECS. AND/OR DWGS | IND ☐ | PURCH. ☐ |
| CONSTRUCTION ISSUE | ORIG. ☐ | ADDENDUM ☐ |
| FUTURE CHANGES TO DWGS. AS REFLECTED ON E.O | ☐ | |
| OTHER ACTION SPECIFY | ☐ | |

**TYPE OF FUNDING**

LI ☐ GPP ☐ CEP ☐ WPAS ☐ EXP ☒

**TYPE OF CONSTRUCTION**

MAINT ☐ OFF ☒

FIXED PRICE CONTACT ☐

**QUALITY ASSURANCE LEVEL**

I, IA, (II, IIA, OR III) (CIRCLE ONE OR MORE)

**INSPECTION REQUIRED**

| | | |
|---|---|---|
| SOURCE | YES ☒ | NO ☐ |
| RECEIVING | YES ☒ | NO ☐ |
| CONSTRUCTION | YES ☒ | NO ☐ |

REFER TO EO NO.

EO RELEASE DATE 10-4-82

**INITIATOR**

A. L. KRIZNAR EXT 69-2722 DATE 9/22/82

**PROJ. ENGR.**

A. L. KRIZNAR EXT. DATE

**FUNCT. MGR.**

R. J. Buiz EXT. 2106 DATE 9-30-82

**F.O.A.**

D. L. Watson EXT. DATE 9/29/82

**E.O. COORDINATOR**

[illegible] EXT. 2766 DATE 10-1-82 3:30 PM

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| MAINT ADM SUPPORT | 334 | | | | |
| SHIFT AREA MGR | | | | | |
| FAC ENGR ADMIN | 206 | 1 | | | DWG |
| PURCHASING | 601 | | | | |
| DES ACCTG | 811 | | | | |
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| CONST PROJ ENGR MGR | 207 | 1 | 1 | 1 | |
| EQUIP PROJ ENGR MGR | 207 | | | | |
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| BASE DES MGR | 701 | | | | |
| POWER ENGR | 811 | 1 | 1 | 1 | |
| MTL & CIVIL DES MGR | 207 | 1 | 1 | 1 | |
| ENGR PROC DES MGR | 207 | 1 | 1 | 1 | |
| LDU BRG | 207 | 1 | 1 | 1 | |
| SOURCE INSPECTION | 207 | | | | |
| RECEIVING INSPECTION | 801 | | | | |
| ENERGY ENGR | 207 | 1 | 1 | 1 | |
| GEN MGR (TRANS LTR ONLY) | 101 | | | | |
| SAFETY MGT MGR | 207 | 1 | 1 | 1 | |
| BDY | 101 | | | | |
| SUPT OPER DIV | 101 | | | | |
| SEISMIC ANALYSIS | 207 | | | | |
| INDUSTRIAL ENGR | | 1 | 1 | 1 | |
| PATENT SYS MGR | 201 | | | | |
| AREA SAFETY REP | | | | | |
| TECHNICAL SECURITY | 101 | | | | |
| EO COORDINATOR | 207 | | | | |
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| 27982-D01 | | P&ID |
| " -D02 | | P&ID |
| -D03 | | EQUIP LAYOUT |
| -D04 | | STRUCTURAL |
| -D05 | | MOTOR POWER PLAN |
| -D06 | | ONE LINE ELECT DIA. |

DESIGN CRITERIA REVIEW PACKAGE INCLUDING ABOVE DRAWINGS.

This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation. See L. Fong or L. Eng for details of my objections & potential alternatives.
Jim Stone 10-13-82

RE-[illegible] write me [illegible]

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IN-PLANT REVIEW: RETURN YOUR COMMENTS TO A. KRIZNAR BLDG. LAKE ARBOR
BY THURSDAY OCT. 14 OR BRING YOUR COMMENTS TO THE REVIEW MEETING
IN ROOM CONF RM BLDG LAKE ARBOR TIME 1:00 PM DATE FRI. OCT. 15, 1982
REVIEWER'S SIGNATURE [signature] DATE 10-13-82

| CHARGE NO | SUFFIX NO. |
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RF-48488 (11/81) DESTROY PREVIOUS ISSUES

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276



BEST AVAILABLE COPY

JA-606

**ENGINEERING CALCULATION SHEET**

PROJECT Nitrate Waste Irrigation — PROJECT NO 315332

BY Jim Stone

To: Al. Kriznak w/copy to Bob Jensen — DATE 12-1-80

CALCULATION: — SHEET 1 of 3

[Handwritten Text]:

COMMENTS ON DESIGN CRITERIA:

1. THE IRRIGATION SYSTEM SHOULD BE LOCATED IN THE AREA NORTH OF THE 207 PONDS & THE PSZ FOR THE FOLLOWING REASONS:
   a) LESS ENERGY & COST DUE TO SHORTER DISTANCE BETWEEN SOURCE OF WASTEWATER & DISPOSAL AREA.
   b) THE AREA SHOULD BE CULTIVATED IN ORDER TO UTILIZE THE EXISTING NITROGEN TRAPED IN THE SUBSOIL & TO STABILIZE THE SLOPES AGAINST EROSION.
   c) THE AREA IS DOWN-GRADE FROM THE PONDS & CAN BE SERVED BY GRAVITY WITH A SIPHON SYSTEM.
   d) THE AREA IS DOWN-WIND FROM THE ROCKY FLATS FACILITY.
   e) THE AREA IS NOT SUITABLE FOR OTHER PURPOSES, SUCH AS FUTURE EXPANSION OF THE ROCKY FLATS FACILITY.
2. THE IRRIGATION SYSTEM SHOULD BE A GRAVITY FED DISPERSAL TRENCH SYSTEM FOR THE FOLLOWING REASONS:
   a) THE GEOLOGICAL FORMATION & THE SOIL TEXTURE IS SUITABLE FOR A SHALLOW TRENCH SYSTEM TO DISPERSE THE WASTEWATER INTO THE ROOT ZONE UNIFORMLY.

b) THE SYSTEM CAN BE OPERATED YEAR-AROUND & IS MORE DEPENDABLE THAN A MECHANICAL SPRINKLER SYSTEM.
c) THE SYSTEM HAS LESS OWNING & OPERATING COSTS.
d) THE SYSTEM IS MORE ADAPTABLE TO THE UNIQUE WIND CONDITIONS AT ROCKY FLATS.
e) THE SYSTEM MEETS THE CRITERIA ESTABLISHED BY THE ENVIRONMENTAL & SAFEGUARDS/SECURITY DIVISIONS.

3. REFERENCES:
a) DRAWING – "NITRATE WASTE IRRIGATION #SK-315332-DC-1"
b) "A SUPPLEMENTARY REPORT TO AN ENGINEERING STUDY FOR WATER CONTROL & RECYCLE CONCERNING THE RECOVERY OF NITRATE LADEN GROUNDWATER" BY ENGINEERING-SCIENCE, INC.
c) "SOIL INVESTIGATION (PSZ)" BY CTL/THOMPSON, INC.
d) "20' WIND ROSE – ROCKY FLATS" BY AEC
e) "FREEZE INDEX – USE OF CLIMATIC DATA IN DESIGN OF SOILS TREATMENT SYSTEMS, BOULDER, CO." BY NO & AA
f) "DESIGN MANUAL – LAND TREATMENT" BY EPA 625/1-77-008
g) "CALCULATIONS – AREA REQ'D" BY J. STONE (SHTS 2 & 3)

JA-608

March 20, 1984

Sam Cerise, Manager
F.E. & C. Design Div.
Rockwell International

Dear Sam:

As a follow-up to our meeting an Monday morning and pursuant to a suggestion by my supervisor, Bob Jensen, I propose that you create a position for an in-house engineering consultant, under your direct supervision, and let me fill it. The work would include special studies, the review of A/E design work and technical assistance to design and project engineers.

An indication of the current need is as follows:

1. Emergency Engineering – these are not on the DPL:

    a) Maintenance space needed in the L.A. shop by May 15, 1984.

    b) B881 computer room cooling for this summer – S & W will not complete planned work until September 1984.

    c) B123 contingency plan to keep the labs in operation. ARIX will not have the plans, much less the work, completed by this summer.

    d) ECON projects to meet need for current fiscal expenditure:
    B371 - Cooling of 11 control rooms
    B443 - Piping modification to test, gas valves.

    e) Equipment purchases in less than the regular 120 days delivery.

2. "State of the Art" Engineering Concepts:

   a) B707 Facility redundancy – we must be first in this competition.

   b) Ground water control and utilization - this is a latent time bomb.

   c) Product improvement by an alternate inert environment.

3. Review A/E Design Work – recent failures:

   a) B123 HVAC work which omitted lab make-up air and heating.

   b) B850 Fire Protection piping with design water velocity at 32 ft./sec.

4. Engineering man-hours and scope of work estimates for A/E negotiations in mechanical, chemical, civil and environmental engineering.

5. Interface between working engineers and computer technology in design and project scheduling in order to facilitate Jeff Haberl's work.

The above situations are only those which have occurred recently. They represent a great challenge and opportunity. I try to accommodate these needs between my regular duties, but we are losing ground. I should be on this full time. Thanks for your consideration.

/S/ JAMES STONE

JA-610

# FUNCTIONAL PERFORMANCE AREAS
# ROCKY FLATS PLANT
8/26/85

GENERAL MANAGEMENT *

TECHNICAL/PROGRAM OPERATIONS

Delivery Performance *
Production Support *
Chemical Operations *
Technical Support
Quality Control *
Development Work
Nuclear Materials Management
Waste Management *
Nonweapons programs

OPERATIONAL SUPPORT

Transportation Safeguards
Security *
Nuclear Safeguards *
Facilities Engineering &
Construction Management
Facilities Maintenance, Utilities
and Energy Conservation Management *
Industrial Safety
Fire Protection
Health Protection
Environmental Protection
Emergency Preparedness
Nuclear Criticality
Facilities Safety

ADMINISTRATIVE SUPPORT

Operating and Capital Resources Management
Financial Management
Legal
Internal Auditing
Automatic Data Processing *
Telecommunications & Data Communications
Records Management
Property Management
Procurement Management
Industrial Relations
Equal Employment Opportunity
Administrative Services
Public Affairs
Classification
Technical Information

* One of the group of FPAs on which CPAF award fees will be based for the 6-month period ending September 30, 1985.

What's the purpose of the 3-month report?

According to Ron Smith, director, Management Systems & Audit, "We use the 3-month report as a corrective tool so that we can take appropriate corrective action before the official 6-month CPAF evaluation."

Does Rockwell have any say in the 3-month grading?

Rockwell reviews the draft preliminary report with DOE/RFAO before it is finalized. "We have the opportunity to discuss grades we don't think reflect the actual performance of the plant," Smith said. "For example, we may believe that a 'significant achievement' which DOE left out should be added. We also have not only the opportunity, but also an obligation, to clarify any situation which could be assessed as deficient, for two reasons: if the assessment is not accurate, to present the facts for proper recognition, or if the assessment is correct, to learn from it and fix it."

How does the 3-month report affect our official 6-month evaluation?

There is some influence, but DOE does not use the 3-month report as an absolute baseline. "We like to think we have the opportunity to work off any deficiencies RFAO perceives in the preliminary 3-month report before the official 6-month CPAF evaluation is performed," Smith said. "Some deficiencies may carry over, but we trust we've corrected all the ones that we can."

How does CPAF affect our operating budget?

CPAF grades do not affect the amount of funding we receive from DOE to operate the plant. However, within our operating budget, DOE gives us the opportunity to earn an award fee. The award fee is based on superior performance in the group of key Functional Performance Areas (FPAs) that DOE identifies for each 6-month CPAF

evaluation period. A higher CPAF grade average can increase the award fee for Rockwell.

Is an award fee automatically given?

No. DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPAs (see attached list). If we do perform at least satisfactory overall, then the CPAF award fee is based on an evaluation of the key FPAs.

How is the CPAF award fee allocated?

Award fee dollars go to Rockwell Corporate just like operating profits from other company divisions. Award fee dollars are not allocated in any manner back to the Rocky Flats Plant, except as indirect benefits from Rockwell Corporate. Naturally, superior performance on our part also enhances our working relationship with our customer, DOE.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

| | |
|---|---|
| Civil Action No. 89-M-1154 | |
| UNITED STATES OF AMERICA *ex rel.* James S. Stone,<br>Plaintiffs, | |
| v. | |
| ROCKWELL AUTOMATION, INC. and BOEING NORTH AMERICAN, INC.,<br>Defendants. | |

## DECLARATION OF HARTLEY DAVID ALLEY

HARTLEY DAVID ALLEY makes this Declaration under 28 U.S.C. 1746, and declares and states as follows:

1. I am one of the attorneys of record for the *qui tam* plaintiff, James S. Stone, in the above-captioned action. I was first retained as counsel for Mr. Stone in this matter in September 1987. The matters stated herein are within my personal knowledge and are true and correct, to the best of my knowledge. My client has not waived the attorney-client or any other legal privilege, and this affidavit contains no information covered by privilege.

2. I was unable to attend the November 25, 2002 hearing before the Court, as I was with Mr. Stone and his wife who had just suffered a life-threatening pulmonary embolism. I have reviewed the transcript of that hearing and, in particular, the statements by counsel for Rockwell suggesting that the absence of any affidavit or other

statements by me on the subject somehow means that the facts support Rockwell's position. That is simply not true.

3. On December 17, 2002, the Court issued "Findings and Conclusions on Limited Remand" with respect to the question of the information that Mr. Stone provided to the government prior to the filing of this action, and in so doing, relied on certain 302 reports prepared by government agents as to meetings that Mr. Stone and (as to one) I attended in 1987 and 1988. In particular, the Court noted that the agents' reports of those meetings did not mention the word "pondcrete." Accordingly, I respectfully submit this affidavit in light of the Court's reliance on such omissions in FBI 302 reports to infer that Mr. Stone did not discuss with the Government information in his possession respecting pondcrete and spray irrigation. As I discuss below, Mr. Stone did provide the Government with information regarding pondcrete and spray irrigation matters in his meetings with the agents prior to the filing of this action.

1988 Meetings with Government Agents

4. On February 17, 1988, Mr. Stone and I attended a lengthy meeting with William Smith, an EPA Special Agent, Jon Lipsky, an FBI Special Agent, and Kenneth Fimberg, Assistant U.S. Attorney. The meeting, which lasted several hours, began in the morning, broke briefly for lunch, and continued well into the afternoon. The discussion consisted primarily of Mr. Stone describing his knowledge of Rocky Flats, Rockwell's operations, the award fee process, Rockwell's directive to its employees not to discuss problems with DOE, and Rockwell's apparent health, safety, and environmental violations.

5. I expressly recall that, at the February 17, 1988 meeting, Mr. Stone told the government agents that

while working at Rocky Flats he had studied the design and implementation of the solar pond sludge removal process, *i.e.*, the "pondcrete" production process. Mr. Stone explained the function of the solar evaporation ponds as a waste disposal site at Rocky Flats. He informed the Government that he had concluded that the process contemplated by Rockwell for the removal of sludge from this waste site with the use of cement would result in a waste form (also known as "pondcrete") composed of an unstable mixture that would deteriorate and release hazardous wastes.

6. At this meeting, Mr. Stone also informed the government investigators that improper waste disposal, in the form of spray irrigation, was occurring at Rocky Flats. I specifically recall Mr. Stone stating that Rockwell's practice of spray irrigation, which was then occurring on the east side of the plant, involved using sprinkler systems to spray water containing hazardous waste for disposal on open ground and over previous waste burial sites. Mr. Stone also expressed his concern that the contaminated water so irrigated would result in contamination of drainage and groundwater.

7. Mr. Stone's comments regarding the solar pond sludge removal process and spray irrigation were not the primary focus of the February 17, 1988 meeting. Nothing was said or done during the meeting to indicate that Messrs. Smith, Lipsky, and Fimberg were not interested in the pondcrete or spray irrigation matters described by Mr. Stone. It was evident from their questions and demeanor, however, that they were highly interested in Rockwell's operation of incinerators at the Plant and any information Mr. Stone had about it. Additional subjects covered by Mr. Stone which then also appeared to be of more immediate interest to the government agents included Beryllium contamination of workers, the submission of false

applications by Rockwell for award fees, and Rockwell's management structure -- including the names of managers at Rocky Flats. Mr. Lipsky, in particular, was most interested in the design and operation of certain incinerators, and had brought photographs of them to the meeting in order to question Mr. Stone on this subject.

8. During the meeting, I informed Messrs. Smith, Lipsky, and Fimberg that I represented Mr. Stone with respect to claims and rights he had against Rockwell, which claims and rights he was reserving under the False Claims Act. I further stated that Mr. Stone's information, gained at Rocky Flats and through his investigation, would result in proof that Rockwell has knowingly submitted false and fraudulent claims to the Government for payment. After the meeting, I prepared and sent a letter to Mr. Fimberg confirming my statement respecting these matters. (A copy of this letter is attached hereto as Exhibit A.)

**The FBI Report of the February 17, 1988 Meeting Is Incomplete**

9. I have reviewed the FBI 302 report of the February 17, 1988 meeting, a copy of which is found in the record at App. 460-463 and is attached hereto as Exhibit B. It does not represent a complete account of all of the subjects discussed at the meeting, or of the details of the subjects discussed at the meeting.

10. As an initial matter, I note that the February 17, 1988 meeting, according to the report, lasted 3 full hours and 50 minutes. The FBI report of that meeting, however, consists only of 3½ short pages. A transcript or verbatim account of a meeting lasting nearly 4 hours should clearly be much longer than 3½ pages.

11. Moreover, the FBI report contains numerous omissions and inaccuracies regarding several technical subjects that were discussed at that meeting.

Examples are:

(a) The FBI report fails to mention that Mr. Stone and I expressly informed the Government agents at the meeting that we considered Mr. Stone's reporting to be made under the False Claims Act, a topic I later confirmed in a letter to Mr. Fimberg;

(b) The FBI report inaccurately states that Mr. Stone listed Rockwell employee Dave Guffy as having knowledge about the incinerator in Building 771; in fact, Mr. Stone specifically identified Mr. Guffy as having knowledge of leaking glove boxes in that Building, a subject that the FBI report does not mention at all;

(c) In the meeting, Mr. Stone reported that there were air ducts in Building 881 which were contaminated with dangerously radioactive special nuclear material, but which had not been removed or decontaminated prior to the conversion of part of that Building into office space; the FBI report however, fails to mention this discussion, and mentions only (at the bottom of App. 462) that Mr. Stone "recapped" Building 881 as the location of "contaminated ducts;"

(d) As noted above, Mr. Stone discussed pondcrete which he described as the "solar pond sludge removal" process; however, the FBI report (at App. 463) only makes a passing reference to this discussion as "STONE also said RFNP has numerous waste sites. . .;

(e) As noted above, Mr. Stone discussed several "waste sites" including the fields where the spray irrigation was occurring, and old waste burial trenches on the east side

of the Rocky Flats Plant; however, the FBI report appears to have lumped this discussion, like that of the solar ponds, into the brief reference to Mr. Stone's discussion of "waste sites" and "previous burial practices."

12. Neither Mr. Stone, to my knowledge, nor I, was given an opportunity to review and correct the FBI report of the February 17, 1988 meeting. Had we been given that opportunity, I would have noted the above as corrections and additions, and I would also have noted that the author misspelled my name even though I had given him my business card.

13. Mr. Stone met with or had spoken to government agents respecting these matters on several other occasions, both before and in the months following the February 17, 1988 meeting.

**Mr. Stone Provided Documents in March 1988**

14. During Mr. Stone's discussions with the government agents before filing this action, Mr. Stone offered to provide the government with certain documents he had in his possession concerning the subjects they had discussed, an offer that Mr. Lipsky accepted.

15. In March 1988, Mr. Stone provided Mr. Lipsky with a set of documents that he had previously obtained during his employment at Rocky Flats that were hand-numbered in the lower right-hand corner. Mr. Stone had hand-numbered them in the lower right-hand corner, as a means of identification. Prior to the delivery of the documents to Mr. Lipsky, I reviewed with Mr. Stone a set of the hand-numbered documents to be provided to Mr. Lipsky. The document collection was hand-numbered from 1 to 1085.

16. In late March 1988, Mr. Stone provided a set of this document collection of about 1100 numbered pages to Mr. Lipsky. A duplicate set of these documents was maintained in my office. Based upon my review of this set of documents, I know that among the numbered documents produced to the government in March 1988 were the following:

Doc. No. 276 – an Engineering Order, dated October 13, 1982, containing Mr. Stone's review and comments on the designs for solar evaporative pond sludge removal, *i.e.*, "pondcrete;"

Doc. No. 4 – an Engineering Calculation Sheet, dated December 1, 1980, entitled "Nitrate Waste Irrigation," containing Mr. Stone's review and comments on the design for the nitrate waste irrigation system;

Doc. No. 410 – an internal memorandum to a Rockwell manager, dated March 20, 1984, describing Rockwell's ground water control system as a "latent time bomb;"

Doc. No. 790 – a listing of Functional Performance Areas (FPA's) for Rockwell with award fee grading area marked; and

Doc. No. 789 – an excerpt from a Rockwell internal letter concerning award fees which states that "DOE will not even consider an award fee if we do not perform at least at a satisfactory level in all 37 FPA's."

Copies of these documents are attached hereto as Exhibit C.

17. Further, in March 1988, Mr. Stone also provided the Government with a copy of his state court complaint, which I prepared. As the Court noted in its December 17, 2002 Order, Mr. Stone discussed spray irrigation in his state court complaint, and provided a copy of it to the Government in 1988. The state court complaint states, in relevant part:

> On December 1, 1980, plaintiff recorded an objection to pumping nitrate enriched wastewater from the east side of the RFP to the west side, for disposal by irrigation, in lieu of simply siphoning the wastewater to lower terraces on the east side. Plaintiff's concern was to reduce the migration of groundwater through contaminated soil on plant-site toward domestic water reservoirs, and to reduce cost. Defendant ignored the plaintiff's engineering report.

(App. 477, State Court Complaint at 6)

Filing of this Action Under Seal in July 1989

18. This was not the end of Mr. Stone's providing information to the Government. These subjects were again covered in his original complaint in this action and the Plaintiff's Confidential Disclosure Statement of Material Evidence and Information, personally served on Michael Norton, the U.S. Attorney for Colorado.

19. The original complaint was filed on or about July 5, 1989 under seal and remained under seal for many months before Rockwell or any member of the public could obtain a copy. In accordance with the False Claims Act, the Disclosure Statement was personally served on Michael Norton, the U.S. Attorney for Colorado, with a copy to the Attorney General. It is my understanding that the government continued its investigation throughout that

period. After the filing of this action, Mr. Stone also continued to meet with the Government.

20. As specified in the Disclosure Statement, it was served on the Government along with four boxes of documents. Copies of the documents listed above regarding pondcrete and spray irrigation were included in the set of four boxes accompanying Mr. Stone's confidential Disclosure Statement. As noted above, however, the documents numbered through 1085 and Mr. Stone's state court complaint were provided to the government over a year earlier.

21. Because the Disclosure Statement was confidential, Rockwell did not get a copy of the Disclosure Statement in 1989. It is my understanding Rockwell later obtained a copy during the discovery phase of this action.

22. In short, prior to the filing of this action, Mr. Stone provided the government with his information that pondcrete production was resulting in pondcrete blocks that would release hazardous wastes. Mr. Stone also told the government that Rockwell had refused to modify the process to remedy the problem. With respect to spray irrigation, Mr. Stone provided the government with his information that improper waste disposal, in the form of spray irrigation, was occurring at Rocky Flats. Mr. Stone answered all of the government's questions on these subjects.

23. I have no information that would lead me to believe that Mr. Stone withheld information from the government in his pre-filing meetings. To my knowledge, information and belief, all information reported to the government by Mr. Stone has been consistently and faithfully based on his direct and independent knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of December 2002, at Burbank, California.

/s/ Hartley David Alley
HARTLEY DAVID ALLEY

JANUARY 1, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE RICHARD P. MATSCH

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UNITED STATES OF AMERICA AND
UNITED STATES OF AMERICA EX REL.
JAMES S. STONE,
PLAINTIFFS.

V.

ROCKWELL AUTOMATION, INC. AND
BOEING NORTH AMERICAN, INC.
DEFENDANTS.

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CIVIL ACTION NO. 89-M-1154

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**ORDER DENYING MOTION FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD**

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On December 24, 2002, James S. Stone filed a Motion for Reconsideration and to Supplement the Record, seeking reconsideration of this court's Findings and Conclusions on Limited Remand, filed December 17, 2002. Tendered with the motion are a declaration of Hartley David Alley, with attachments, and an affidavit of James S. Stone. The stated justification for this effort to supplement the record is that at oral argument on November 25, 2002, the court rejected the defendants' submission of an affidavit of Mr. Thompson, expressing an opinion regarding the reliability of FBI 302 reports, and made a comment on the court's own experience with such reports. Counsel for the Relator contend that

because of this comment, "Mr. Stone understood that the court had rejected Rockwell's argument that any 'omissions' in the 302 reports constituted 'evidence' of any facts or inferences based upon such 'omissions.'" Because the court considered the lack of information regarding pondcrete in the reports of Agent Lipsky, counsel claims that rejection of the new affidavit and declaration would work a "manifest injustice."

A fair reading of the transcript demonstrates that the court did not mislead Mr. Stone or his counsel. The colloquy between the court and counsel for the defendants as well as that with counsel for the Relator during her rebuttal argument, make it clear that the court would consider the FBI 302 reports as a part of the agreed upon record to be used to make the findings required by the Tenth Circuit Court of Appeals. To now accept this declaration and affidavit would be inconsistent with what was stipulated to be the record to be used for the decision in this case and would require the court to accept, at face value, without an opportunity for cross-examination or otherwise test the credibility would obviously prejudice the defendants. To reopen the matter to include these additional statements would require that the defendants be given an opportunity to cross-examine the declarants and that would unduly prolong these proceedings.

In this court's view, it has considered the agreed upon record and made findings consistent with the agreements of counsel and the material in the record. It is therefore

ORDERED that the motion for reconsideration and to supplement the record is denied.

Dated: January 21, 2003

BY THE COURT:
/s/ Richard P. Matsch
Richard P. Matsch, Judge

April 5, 2006

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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|---|---|
| UNITED STATES OF AMERICA, *ex rel.* JAMES S. STONE, and UNITED STATES OF AMERICA,<br><br>Plaintiffs-Appellees and Cross-Appellants,<br><br>v.<br><br>ROCKWELL INTERNATIONAL CORP., and BOEING NORTH AMERICAN, INC.,<br><br>Defendants-Appellants and Cross-Appellees. | NOS. 99-1351, 99-1352, & 99-1353 |

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**ORDER**
**GRANTING MOTION FOR AWARD OF ATTORNEYS' FEES**

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Before **BRISCOE, HOLLOWAY** and **HARTZ**, Circuit Judges

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In these related appeals, all merits issues have been

determined. There remains pending the motion of plaintiff Stone for an award of attorneys' fees. As prevailing party in the main appeal by Rockwell, Stone is statutorily entitled to a fee award. We have previously noted that the fee provision in 31 U.S.C. § 3730(d)(1), which provides for recovery of fees by a successful *qui tam* relator, is phrased in mandatory language. *Shaw v. AAA Eng. & Drafting, Inc.*, 213 F.3d 538, 544 (10th Cir. 2000).

We therefore grant the motion and remand to the district court for a determination of a reasonable fee award. *See Hoyt v. Robson Cos.*, 11 F.3d 983, 985 (10th Cir. 1993).

Entered for the Court
Elisabeth A. Shumaker, Clerk of Court

By: /s/ Audrey F. Weigel
Deputy Clerk

Nos. 99-1351, 99-1352, & 99-1353, United States of America, *ex rel.* James S. Stone, et al. v. Rockwell International Corp., et al.

**BRISCOE, J.**, dissenting:

I respectfully dissent. As I did not join the majority in its resolution of these cases on their merits, I likewise would not grant plaintiff Stone's motion for fees as a prevailing party.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-M-1154

UNITED STATES OF AMERICA
*ex rel.* JAMES S. STONE,

Plaintiffs,

v.

ROCKWELL INTERNATIONAL
CORPORATION and BOEING
NORTH AMERICAN, INC.

Defendants.

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**AFFIDAVIT OF MARIA T. VULLO
IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES AND EXPENSES**

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STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

MARIA T. VULLO, being sworn, states:

1. I am a member of Paul, Weiss, Rifkind, Wharton & Garrison, lead counsel in this case for the *qui tam* plaintiff, James S. Stone. I submit this affidavit in support of our motion for attorneys' fees and expenses in order to present a brief summary of the services rendered and expenses incurred by Paul, Weiss in connection with this case.

* * *

22. We also spent 19.68 attorney hours and 9.3 support hours on other projects that do not fall readily into the categories of court-related activities or discovery. Most of

the time here was spent on calls or meetings with DOJ regarding general strategy, and researching other potential legal issues that might be raised by either the government or Rockwell in the context of government intervention.

*January 2, 1997-December 31, 1997*

23. With the grant of government intervention in November 1996, a new phase of the litigation commenced. Rather than being asked to take a smaller role in the case, Paul, Weiss and DOJ worked together as full and equal co-counsel for the plaintiffs in the prosecution of this case, and we complemented each other in many respects. Not only did we continue to participate in all discovery matters, we often took the lead on researching, drafting and writing papers to be filed with the Court.

24. During 1997, we spent a total of 2,054.15 attorney hours and 1,062.7 support hours on a wide variety of discovery-related projects, with most of the projects done in conjunction with the attorneys from DOJ. First, we assisted in the preparation and taking of several depositions that were conducted in the first half of 1997. Second, we conducted numerous witness interviews throughout the year. Third, we spent time reviewing documents related to three separate document review trips in Colorado during three separate weeks in September and October 1997.

25. In addition to discovery, there were a large number of motions filed during 1997. First and foremost, starting in the beginning of this time period, Rockwell had embroiled the parties in a long process of appeal to the Tenth Circuit on this Court's decision to grant government intervention. The Tenth Circuit ultimately upheld this Court's decision. Around the same time, a number of other motions were being prepared. We assisted the DOJ attorneys with a motion for summary judgment based on collateral estoppel

principles and a motion to strike Rockwell's affirmative defenses. While DOJ took the lead on the summary judgment motion and the motion to strike, we took the lead in preparing, researching and responding to a number of discovery motions filed by Rockwell in April 1997 (various motions for protective orders) and in July 1997 (four motions to compel which the Court denied).

26. Additional briefing was submitted during this period with respect to the binding effect of the plea agreement, and we took an active role in preparing those documents. In addition, we continued to prepare the usual scheduling orders for the Court and attended the corresponding status conferences. By our count, at least four such conferences were held during 1997: in May, June, August and December. Finally, during the months of June, July and November of 1997, we continued to research the intricate issues raised by our anticipated Rule 6(e) motion to unseal the grand jury transcripts and we began to draft the necessary papers. With regard to all of these motions, court filings, hearings and status conferences, we spent a total of 1,783.5 attorney hours and 63.3 support hours during the year 1997.

27. During 1997, we also had both internal meetings and meetings with our co-counsel at the Department of Justice to discuss trial strategy, and in particular, to discuss the various roles and responsibilities to be undertaken by each of our two teams at trial. We spent about 157.4 attorney hours during this time period in assessing trial strategy and beginning to prepare for trial.

*January 1, 1998-June 25, 1998*

28. With about six months to go before the July 6, 1998 trial date, we worked hard to finish fact discovery, to start and finish "expert" discovery, to make any necessary

motions prior to trial, and to file the requisite pre-trial papers. As for fact and opinion discovery, we spent 2,409.5 attorney hours and 1,329.4 support hours, a sum reflecting the enormous number (approximately 85) of fact depositions taken during this time period and the large number of opinion witnesses designated by Rockwell to provide testimony on Rockwell's behalf.

29. As for opinion discovery, we worked with DOJ in a number of respects. First, we worked with DOJ in the preparation of Rule 26 disclosures from two accounting and damages witnesses retained for our damages case and from a possible rebuttal witness on waste solidification issues. More significantly, the Paul, Weiss team spent additional time dealing with the five opinion witnesses designated by Rockwell to testify about issues at other DOE facilities around the country and matters unrelated to Rocky Flats. We prepared and filed a motion *in limine* to exclude their proffered testimony, a motion which is described in greater detail below, and a motion which we won. We also prepared for and took the depositions of two other opinion witnesses hired by Rockwell—Adrian Brown and Joseph Tamburini—whom Rockwell never called at trial.

30. In addition to the considerable discovery activities, we took the lead on two critical motions that were made during this period: (1) the motion *in limine* to exclude Rockwell's "experts" on other facilities; and (2) the motion to release the grand jury transcripts. Both motions involved issues with ramifications during the trial of this case. Our work on these motions and related court activities entailed an expenditure of 1,498.4 attorney hours and 263.6 support hours. We filed our motion *in limine* to exclude the proffered testimony of Rockwell's hired witnesses on other facilities on May 31, 1998. On June 11, 1998, the Court heard our motion and agreed that the proffered testimony by these individuals was not relevant to the issues in this case.

31. The second motion—the petition to release grand jury transcripts pursuant to Rule 6(e)—was made by us alone as Mr. Stone's counsel and entailed an enormous commitment of time and resources largely due to the outpouring of opposition from Rockwell, Rockwell's criminal counsel, and a score of individual intervenors and their counsel. We filed an initial petition on January 15, 1998; responded thereafter to a barrage of papers filed by Rockwell and the intervenors; attended the hearing on the petition before this Court in February, 1998 (at which this Court granted the petition); defended the subsequent appeal to the Tenth Circuit by Rockwell and its bevy of intervenors; participated in a four-hour hearing before the Tenth Circuit on April 1, 1998; prepared a supplemental petition following the order of the Tenth Circuit; and attended the hearing on the supplemental petition before this Court on June 2, 1998.

32. During this same period, we prepared for trial, spending about 862.0 attorney hours and 367.1 support hours in trial preparation. We had a number of meetings both internally and with DOJ to discuss trial strategy. We attended the pre-trial conference before the Court on June 2, 1998. In addition, pursuant to Fed. R. Civ. P. 26 and the local rules, there were a number of pre-trial submissions to be made. Although trial did not go forward on July 6, 1998, we saved all of our work on trial preparation and continued to build upon our work into the next period.

*June 26, 1998-November 2, 1998*

33. Throughout this next period, we continued our intense preparations for trial and spent a number of hours assisting DOJ in addressing the discovery of some 900 boxes of DOE documents (the vast majority found to be irrelevant to this case) shortly before the July 6, 1998 trial date. We

spent about 481.2 attorney hours and 5.4 support hours on this project.

34. Our work on trial preparation during this time period involved four major projects, on which we spent about 1,170.4 attorney hours and 227.1 support hours. First, starting in July 1998, we resumed our work on the jury instructions, and completed extensive legal research on all of the issues raised by the False Claims Act instructions. Second, we spent time at the end of September and into October responding to issues raised by Rockwell's proposed jury instructions, including briefs on the subject of the relator's role at trial. Third, we prepared a number of evidence outlines for the subject matters and witnesses to be presented at trial. Fourth, we spent time in preparing the damages case for trial, some during this period and, to a larger extent, during the next period.

35. In addition to trial preparation, we spent 502.4 attorney hours and 30 support hours working on several motions. Most of these hours were spent on a series of court filings regarding contract interpretation which started with a motion for an injunction under the All Writs Act. We did the research and wrote a motion (filed on August 13, 1998) to compel the defendants to produce information it possessed relating to jury polling. We also wrote the response to defendants' request to use videotaped depositions at trial. We attended status conferences and hearings with the Court regularly throughout this time period.

*November 3, 1998-February 21, 1999*

36. During these last four months before the commencement of trial, we were entirely consumed by trial preparation activities. During this period leading up to trial, our firm spent 1,967.3 attorney hours and 847 support hours

on a number of important projects. We worked closely with the Department of Justice attorneys on virtually every aspect of trial strategy. We continued to work on jury instructions and issues that Rockwell's counsel raised regarding jury instructions. We continued to update and revise our case and witness outlines. We did extensive work on preparing the damages case for trial.

37. We also worked on all of the pre-trial submissions that were due to be filed with the Court in January, 1999. We helped prepare the trial exhibit list (consisting of 3,000 trial exhibits), the witness list, and the final pre-trial order. Another significant project involved the review of defendants' trial exhibits (some 2,000 exhibits) for the purpose of designating evidentiary objections. We reviewed trial exhibits and prepared examination outlines for the witnesses we were to examine at trial. We also prepared for and attended the pre-trial conference on February 4, 1999 and the final pre-trial conference on February 19, 1999.

38. Several additional motions were filed during this period, on which 585.8 attorney hours and 8.1 support hours were spent. Throughout November and December, we worked on subsequent rounds of the motion for an injunction under the All Writs Act and for a ruling on contract interpretation. At the November 24, 1998 hearing, the Court asked for supplemental briefing on the issues. We assisted DOJ in preparing our supplemental brief and attended the hearing on December 29, 1998 on this matter. In mid-February, we made a motion *in limine* regarding other facilities—on issues which the Court agreed at the February 19, 1999 final pre-trial conference. We also helped prepare and finalize plaintiffs' response to Rockwell's motion *in limine* regarding missing logbooks which was filed on February 18, 1999.

39. Finally, during this time period, we took the lead in

dealing with eleven additional depositions that Rockwell was seeking to take. We prepared for and attended most of these depositions. We spent 95.3 attorney hours and 33 support hours on this project.

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

(13)

No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF OF PETITIONERS ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.

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## QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

## LIST OF PARTIES

Petitioners Rockwell International Corp. and Boeing North American, Inc., were the appellants in the Tenth Circuit. The respondents are the United States of America and the United States of America *ex rel.* James S. Stone.

## RULE 29.6 STATEMENT

Petitioner Rockwell International Corp. was renamed Boeing North American, Inc. Petitioner Boeing North American, Inc. has since been merged into The Boeing Company. State Street Bank and Trust Company beneficially owns 10% or more of The Boeing Company's stock.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i
LIST OF PARTIES ..... ii
RULE 29.6 STATEMENT ..... ii
TABLE OF CONTENTS ..... iii
TABLE OF AUTHORITIES ..... v
JURISDICTION ..... 1
STATUTES INVOLVED ..... 1
STATEMENT OF THE CASE ..... 1
SUMMARY OF ARGUMENT ..... 16
ARGUMENT ..... 20
I. THE TENTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE ORIGINAL SOURCE EXCEPTION CANNOT BE RECONCILED WITH THE SIGNIFICANT LIMITATIONS CONGRESS IMPOSED ON *QUI TAM* SUITS AFTER *MARCUS V. HESS* ..... 20
II. THE TENTH CIRCUIT ERRONEOUSLY HELD THAT STONE HAD "DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION ON WHICH THE ALLEGATIONS" WERE BASED ..... 25
A. The Tenth Circuit Misinterpreted The Statutory Text ..... 26
B. Stone Cannot Qualify As An Original Source Under Any Reasonable Interpretation Of The Statute ..... 37

III. STONE FAILED TO PROVIDE SUFFICIENT INFORMATION TO THE GOVERNMENT AS REQUIRED BY SECTION 3730(E)(4)(B) ..... 43

A. Stone's Engineering Order Did Not Contain Sufficient Information To Satisfy § 3730(e)(4)(B) ..... 44

B. Burying A Cryptic Engineering Order In 2,300 Pages Of Documents Did Not Qualify As Voluntary Production ..... 45

IV. STONE CANNOT SATISFY THE ADDITIONAL DISCLOSURE REQUIREMENT FOUND IN SECTION 3730(E)(4)(A) UNDER THE ALTERNATIVE INTERPRETATION ADOPTED BY THE SECOND AND NINTH CIRCUITS ..... 49

CONCLUSION ..... 50

## TABLE OF AUTHORITIES

Page(s)

### CASES

*Boelens v. Redman Homes, Inc.*,
759 F.2d 504 (1985) ..... 29

*Brown v. Gardner*,
513 U.S. 115 (1994) ..... 43

*Callejo v. Bancomer*,
765 F.2d 11001 (5th Cir. 1985) ..... 27

*Commissioner of Internal Revenue v. Clark*,
489 U.S. 726 (1989) ..... 24, 37

*Exxon Mobil Corp. v. Alpattah Services, Inc.*,
545 U.S. 546, 125 S. Ct. 2611 (2005) ..... 24

*Hays v. Hoffman*,
325 F.3d 982 (8th Cir. 2003) ..... 27

*Hindo v. University of Health Sciences/The Chicago Medical School*,
65 F.3d 608 (7th Cir. 1995) ..... 33

*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,
456 U.S. 694 (1982) ..... 29

*Kas v. Financial General Bankshares, Inc.*,
796 F.2d 508 (D.C. Cir. 1986) ..... 47

*McNutt v. General Motors Acceptance Corp.*,
298 U.S. 178 (1936) ..... 29

*Pavlides v. Galveston Yacht Basin, Inc.*,
727 F.2d 330 (5th Cir. 1984) ..... 48

*Phillips, Inc. v. Walling*,
324 U.S. 490 (1945) ..... 24, 37

*Rapanos v. United States*,
126 S. Ct. 2208 (2006) ..... 33

*SEC v. Falstaff Brewing Corp.*,
629 F.2d 62 (D.C. Cir. 1980) ..... 47

*Saudi Arabia v. Nelson*,
507 U.S. 349 (1993) ..... 26, 32

*Seal 1 v. Seal A*,
255 F.3d 1154 (9th Cir. 2001) ..... 50

*The Josefa Segunda*,
23 U.S. 312 (1825) ..... 35

*Titus v. United States*,
87 U.S. 475 (1874) ..... 34

*United States v. Bank of Farmington*,
166 F.3d 853 (7th Cir. 1999) ..... 44

*United States v. Connor*,
138 U.S. 61 (1891) ..... 34

*United States v. Dunkel*,
927 F.2d 955 (7th Cir. 1991) ..... 47

*United States v. Halper*, 490 U.S. 435 (1989),
*overruled on other grounds, Hudson v.*
*United States*, 522 U.S. 93 (1997) ..... 46

*United States v. Harrison*,
524 F.2d 421 (D.C. Cir. 1975) ..... 48

*United States ex rel. Aflatooni v. Kitsap Physians Services*,
163 F.3d 516 (9th Cir. 1998) ..... 31

*United States ex rel. Barth v. Ridgedale Electric, Inc.*,
44 F.3d 699 (8th Cir. 1995) ..... 35

*United States ex rel. Devlin v. California*,
84 F.3d 358 (9th Cir. 1996) ..... 30

*United States ex rel. Dick v. Long Island Lighting Co.*,
912 F.2d 13 (2d Cir. 1990) ..... 49

*United States ex rel. Doe v. Doe Corp.*,
960 F.2d 318 (2d Cir. 1992) ..... 23, 35

*United States ex rel. Findley v. FPC-Boron Employees' Club*,
105 F.3d 675 (D.C. Cir. 1997) ..... 24, 30, 44

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*,
190 F.3d 1156 (10th Cir. 1999) ..... 29

*United States ex rel. Jones v. Horizon Healthcare Corp.*,
160 F.3d *326* (6th Cir. 1998) ..... 32

*United States ex rel. King v. Hillcrest Health Center, Inc.*,
264 F.3d 1271 (10th Cir. 2001) ..... 33. 44

*United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*,
985 F.2d 1148 (2d Cir. 1993) ..... 17, 35

*United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 26

*United States ex rel. Luckey v. Baxter Healthcare Corp.*, *183* F.3d 730 (7th Cir. 1999) ..... 40

*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) ..... 21, 46

*United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) ..... 27

*United States ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002) ..... 33

*United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, *186* F.3d 376 (3d Cir. 1999) ..... *Passim*

*United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... *Passim*

*United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 17, 23, 30, 35, 36

*United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ..... 26, 30, 32, 41, 49

*United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) ..... 22

*United States ex rel. Zaretsky v. Johnson Controls, Inc.*,
457 F.3d 1009 (9th Cir. 2006) ..... 43

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*,
529 U.S. 765 (2000) ..... 24

*Wellness Community-National v. Wellness House*,
70 F.3d 46 (7th Cir. 1995) ..... 29

*Werner v. Werner*,
267 F.3d 288 (3d Cir. 2001) ..... 47

## DOCKETED CASES

*Hays v. Hoffman*,
No. 01-3888 (8th Cir. 2002) ..... 30, 36

*United States ex rel. Fine v. California*,
No. 93-15728 (9th Cir. 1993) ..... 31

*United States v. Enriquez*,
No. 94-4760 (11th Cir. 1994) ..... 30

## FEDERAL STATUTES

18 U.S.C. §1001 ..... 5

28 U.S.C. § 1254(1) ..... 1

31 U.S.C. §§ 3729 ..... *Passim*

31 U.S.C. § 3730 ..... *Passim*

31 U.S.C. § 3733 ..... 24

Pub. L. No. 78-213, 57 Stat. 608, 609 (1943) ..... 22

## LEGISLATIVE MATERIALS

89 Cong. Rec. 7571 (Mar. 22, 1943) ..... 21

89 Cong. Rec. 10845-46 (Dec. 17, 1943) .. ..... 21

Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696 ..... 20

H.R. Rep. No. 933 (1943) ..... 21

H.R. 1203, 78th Cong., 1st Sess., (1943) ..... 21

S. Rep. No. 291 (1943) ..... 21

S. Rep. No. 345, 99th Cong., 2d Sess. (1986),
*reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 22, 46

## OTHER AUTHORITY

Fed R. Civ. P. 15(b) ..... 28

Fed. R. Evid. 401 ..... 36

Fed. R. Evid. 404(b) ..... 36

7-29 Corbin on Contracts § 29.9 ..... 48

John T. Boese, 1 Civil False Claims and Qui Tam Actions
§ 1.01[A] (3d ed. 2006) ..... 20

Federal Bureau of Investigations, Manual of Administrative Operations and Procedures
Part II, § 10-17.11 (Effective 1985) ..... 48

## JURISDICTION

The Tenth Circuit denied rehearing and rehearing *en banc* on January 4, 2006. Pet. App. 56–57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The text of 31 U.S.C. §§ 3729 and 3730 is reprinted in the appendix to this brief.

## STATEMENT OF THE CASE

This is a *qui tam* action brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33, by James S. Stone, a former employee at the Rocky Flats nuclear weapons plant in Golden, Colorado. Rockwell International Corporation ("Rockwell")[1] operated Rocky Flats for the Department of Energy ("DOE"). The jury found that Rockwell secured payments from DOE in violation of the FCA by making false statements concerning a stored waste form known as "pondcrete." *See* Pet. App. 18a, 50a; JA 402-06, 416-17, 548-50; Tr. 5290. Pondcrete was manufactured by mixing sludge from solar evaporation ponds with Portland cement, pouring the resulting mixture into large boxes, and allowing it to solidify. JA 467; Tr. 982. This was the "generally accepted" method to handle such wastes. Tr. 4739, 4815. Stone and the United States argued to the jury that pondcrete blocks at Rocky Flats failed to solidify because Rockwell employees cut the amount of cement being added to the mixture. *See, e.g.*, Tr. 5177.

From the outset of this case, it has been undisputed that Stone's pondcrete claims were based on "allegations or transactions" that had beer previously disclosed to the public, and that the *qui tam* provisions of the FCA accordingly barred Stone's claims unless he qualified as an "original source" within the meaning of 31 U.S.C.

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[1] In 1996, The Boeing Company acquired Rockwell and changed its name to Boeing North American, Inc. Thereafter the contract between Rockwell and DOE for management of Rocky Flats was amended to reflect the contractor's name change.

§ 3730(e)(4)(B).[2] *See* JA 312–13 & n.2; CA App. 1408–58; *see also infra* note 7 and accompanying text. The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).

The undisputed facts establish that Stone had no firsthand knowledge of the fraud at issue because his employment was terminated more than a year before all of the events that gave rise to the jury's finding of liability. *See* Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Stone instead claims to have *predicted* the fraud based on incidents that occurred years before. He claims to have *predicted* that pondcrete would be insolid because he had concerns about the proposed design of a piping system reflected in an Engineering Order (which had nothing to do with why the pondcrete actually later failed), and to have *predicted* that Rockwell would ultimately make false claims about it based on his general observation of Rockwell's corporate culture and handling of different environmental issues during the time he was employed there. The Court of Appeals held that these speculative inferences and predictions qualified as "direct and independent knowledge" of the later fraud because it interpreted the statute to require only limited "'knowledge 'underlying or supporting' the fraud allegation." Pet. App. 20–21a. Applying that standard, it made no difference that Stone did not even claim to have direct knowledge of the key false statements and environmental violations that he actually sought to prove at trial. As Judge Briscoe explained, the "direct and independent knowledge possessed by" Stone was so tangential that it "could have been omitted entirely at trial

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[2] The Tenth Circuit found—based on the jury's verdict, record evidence as to the timing of Stone's allegations, and Stone's own concessions—that Stone could only prevail if he qualified as an original source of "his 'pondcrete' claims." Pet. App. 50–51a; *see also infra* note 5.

without affecting the outcome." Pet. App. 48a. Indeed, it was. Stone did not testify, and the Engineering Order allegedly representing his "original" information about pondcrete was never even introduced into evidence.

The Court of Appeals also held that Stone's production of that irrelevant Engineering Order, buried in 2,300 pages of documents, was itself sufficient to meet his additional burden of proving that he "voluntarily provided the information" on which the allegations of his action were based "to the Government before filing." 31 U.S.C. § 3730(e)(4)(B). In other words, the court held that Stone satisfied this central statutory limitation on jurisdiction by delivering a single page of paper, even though the piping problem Stone claims to have predicted from that Order did not in fact occur and had nothing to do with his allegations at trial. Indeed, the Order does not even spell out Stone's supposed prediction and Stone failed to prove that he ever explained the Order's significance to the Government.

**Procedural History**

*1. Background.* The pondcrete problem at Rocky Flats developed after Stone left. Stone worked at Rocky Flats between November 1980 and March 1986, when he was laid off as part of a reduction in force. Pet. App. 3a; CA App. 85, 105. In June 1985, Rockwell began manufacturing pondcrete as a method of disposing of waste materials. CA App. 1824. During Stone's tenure at Rocky Flats, the pondcrete blocks that were manufactured came out "concrete hard." *See* Tr. 5177 (foreman Fryback "was able to get concrete hard pondcrete blocks"); Tr. 4884–85 (Fryback replaced in October 1986). On July 31, 1986, four months after Stone left Rocky Flats, DOE and the Environmental Protection Agency ("EPA") "entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were" regulated by the Resource Conservation and Recovery Act ("RCRA"). JA 52. Prior to this time, it was unclear whether RCRA applied at all to mixed wastes such as pondcrete. *Id.*; CA App. 0790, 2031–32. After this agreement was reached, Rockwell came

under pressure to "substantially increase[]" the "rate of production" of pondcrete blocks. Tr. 618, 595–96.

In May of 1988, several insolid pondcrete blocks were discovered on an outdoor pad where they were stored. Tr. 601–02, 631–32, 1124–25; JA 486. This discovery prompted a canvass revealing "several thousand boxes" of insolid pondcrete. Tr. 636–38, 784–87. The media reported that the pondcrete blocks, which were "supposed to be solid," actually "had the consistency of mayonnaise" because instead of mixing "3.5 pounds of cement" into every "1 gallon of the sludge," workers had used only "1.8 pounds of cement to 1 gallon of sludge." CA App. 889-38–39, 1343–45.

2. *The Government Investigation.* Before Stone filed this action, the FBI and the DOE began a "massive" investigation to determine whether Rockwell was concealing RCRA violations at Rocky Flats, making false certifications of compliance with RCRA, and thereby improperly securing payments from DOE. Pet. App. 6–7a; JA 113–28, 133–38, 356, 366–67. Stone played a limited role in that investigation. In 1987 Stone had the first of two documented meetings with Agent Jon Lipsky of the Federal Bureau of Investigation ("FBI"). Pet. App. 73a. Stone's communications with the FBI are memorialized in the FBI's 302 reports. JA 250–67. Those reports show that Stone's principal accusation against Rockwell concerned illegal incineration of hazardous and radioactive wastes. JA 251–52, 256–57, 265. The Government later determined that the incineration charges were meritless. CA App. 803. The 302s make no reference to pondcrete. Pet. App. 73–74a.

Using information developed in his own investigation as well as some information provided by Stone, Agent Lipsky prepared an affidavit that was used to procure a search warrant for Rocky Flats. Pet. App. 4a; *see also* JA 97; Lipsky Aff. ¶¶ 1.20, 6.3, 7.20–22, 8, *attached to* Def.'s Mot. in Limine (Nov. 10, 1997). On June 6, 1989, the FBI and the EPA raided Rocky Flats. Pet. App. 4a. DOE promptly announced its own investigation. JA 113–28, 133–38.

Agent Lipsky's affidavit was unsealed a few days later. Pet. App. 4a. It included the three key allegations that would later form the basis for Stone's FCA action: (1) that pondcrete blocks were insolid "due to an inadequate waste-concrete mixture," JA 429; (2) that Rockwell secured "performance bonus[es] ... based on Rockwell's alleged 'excellent' management at Rocky Flats," JA 98; and (3) that Rockwell deceived the Government about its environmental performance, making "false statements and conceal[ing] ... material facts ... in violation of [RCRA] and 18 U.S.C. §1001." JA 99.

Local papers picked up these "allegations," reporting that "performance bonuses" were "paid to Rockwell based on falsified evaluations." JA 141–44; *see also* JA 113–20, 133–40, 145–57. For example, on June 7, 1989, the Los Angeles Times reported allegations of "concealment of environmental contamination" and referenced a December DOE report that "listed 32 new safety problems." JA 129–32. One of those 32 problems was insolid pondcrete, caused by insufficient cement. *See* Final Pretrial Order, Ex. E at 23, Feb. 4, 1999 (quoting 1988 DOE "Safety Performance Review" of Rocky Flats as describing pondcrete failure due to "use of insufficient cement").

The FBI's investigation of pondcrete was not attributable to information received from Stone. What "led" the FBI to "commence [its] investigation of pondcrete" in the first week of the investigation was the FBI agents' own observation of pondcrete blocks in an area "designated ... RCRA Unit 15." Tr. 3515–16. By June 14, Representative Pat Schroeder was publicly calling for Rockwell to return bonus payments to the Government as "reparations," and to pay to "clean[] up pollution 'caused by Rockwell in the first place.'" CA App. 1047.

The Government did not view Stone as a whistleblower. In a statement after the FBI raid, the U.S. Attorney who led the investigation said that the Rocky Flats case was unusual because "at no time ... did any knowledgeable 'insider' come forward." JA 343. "Almost always," he

explained, "someone eventually 'cracks' and steps forward to provide an 'insider's' cooperation. That simply did not happen here." *Id.* Instead, the Government discovered the facts through its own efforts, "stringing together thousands of documents to create inferences of criminality." *Id.* The day after the raid, newspapers quoted an unnamed DOJ source who said "[n]o 'whistle blower' was involved." JA 118. The DOJ attorney who led the plea bargain negotiations later told Congress that "candidly ... in the criminal investigation we found the information that [Stone] supplied to have very limited usefulness." Add'l Record on Remand filed Apr. 24, 2002, Tab 3(A), at 367.

At the conclusion of the Government's investigation, Rockwell pled guilty to four RCRA violations and six Clean Water Act violations, each of which occurred after Stone left Rocky Flats. Pet. App. 6–7a; JA 50–72. The first two counts in the Plea Agreement charged Rockwell with knowingly storing insolid pondcrete in violation of RCRA. JA 53–57.

*3. Stone's FCA Action.* Stone hurried to the courthouse and, within a month after the public disclosures of the Government's investigation, filed his *qui tam* lawsuit alleging that Rockwell concealed RCRA violations.[3] Pet. App. 4–5a, JA 43. Stone's complaint was scattershot, covering a broad range of issues and "contain[ing] little or no specification of the statements he believed were false." JA 364; *see also* Pet. App. 4–5a.

When Stone filed his complaint in 1989, he provided the Government with a Confidential Disclosure Statement that disclosed "substantially all [of his] material evidence and information," as mandated by 31 U.S.C. § 3730(b)(2). Pet. App. 6a; JA 299. Stone took pains in this Statement to claim that he was "an original source of information" supporting his allegations. JA 277–78. The Statement alleged 26 environmental or safety issues, ranging from alleged illegal

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[3] Stone added a claim for retaliatory discharge that was not present in Agent Lipsky's affidavit. JA 47–48. Stone also brought that claim in state court, and lost. CA App. 0105.

waste incineration to inadequate energy conservation. JA 282–93. Many of these allegations duplicated those in the Lipsky Affidavit. CA App. 137, 190–196, 601–603. Only one concerned pondcrete. JA 289–90. Stone claimed to have reviewed "a design for the process and mechanical system" that would be "used for removing sludge" from solar evaporation ponds "used to treat RCRA hazardous wastes," and to have "fores[een] that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement." *Id.*

While it alleged a general culture "of concealment and cover-ups," JA 278, the Statement did not identify any false statements or claims made to the Government. The closest it came was to allege that, in 1981, Stone decided that a design schematic called for the installation of cooling towers that Stone judged to be unjustified. JA 279. When Rockwell declined Stone's invitation to cancel the cooling tower order, Stone departed from the chain of command and took his complaint directly to DOE. *Id.* Thereafter, manager William Nichol told Stone "not to communicate" unilaterally with DOE. JA 280. Nichol was not involved in or responsible for pondcrete production. And in Stone's deposition, his counsel represented that the cooling tower incident is "not part of the case" and "doesn't matter." JA 106.

Along with his Statement, Stone also provided the Government with 2,300 pages of documents. Pet. App. 73a.

*4. The Government's Intervention.* Government attorneys at the time felt that Stone lacked sufficient information to sustain his FCA claims. In March 1992, the Government declined to intervene. Pet. App. 6a; JA 350. In December of 1992, the Government attorney in charge of the *Stone* case reviewed the Sentencing Memorandum in the criminal case. JA 366–67. Upon reviewing information uncovered by the FBI in its publicly disclosed investigation of allegations of wide-ranging RCRA violations, false statements, and false claims, he "realized that there might be merit to the allegations in *Stone* after all." *Id.* He therefore "embark[ed] upon additional investigation," which

entailed reviewing interview memoranda generated by the EPA and the FBI as part of the criminal case. JA 367; *see also id.* at 350–51, 366–79. Based on that information, in November of 1995, the Government decided to intervene and, with Stone, filed an Amended Complaint. Pet. App. 8–9a; JA 352.

The Amended Complaint asserted that Rockwell committed "violations of RCRA" which it "concealed ... from DOE" and "thereby fraudulently induced DOE ... to pay Rockwell more in award fees." JA 402. Specifically, the Amended Complaint charged that Rockwell violated RCRA by storing leaky pondcrete blocks. JA 402-06.[4] Stone, but not the United States, asserted another FCA count charging concealment of plutonium contamination. Pet. App. 8–9a; JA 418-24. The district court ordered a separate trial on Stone's plutonium claim, Pet. App. 9a, which has not yet been scheduled. Per the pre-trial order, plaintiffs submitted a detailed Statement of Claims, which enumerated specific examples of "false ... statements ... to DOE regarding the pondcrete ... operations [and] their conformity with RCRA." JA 465-90.

*5. Trial.* The pondcrete claims were tried to a jury, Pet. App. 9a, but none of the evidence upon which plaintiffs relied came from Stone. Plaintiffs told the jury that "the three years that are important to this case" were 1987 through 1989—years in which Stone never set foot inside Rocky Flats. Tr. 209. Stone never testified at trial. In discovery, Stone had identified 48 individuals with relevant knowledge, CA App. 1232–80, not one of whom testified at trial. Of the 55 witnesses who did testify, none even mentioned Stone's name. And although Stone supplied four boxes of documents to the Government along with his confidential disclosure statement, JA 293–97, he later signed an affidavit which identified only four documents in those

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[4] The Amended Complaint also charged concealment of "saltcrete" and "spray irrigation" problems. JA 402-12. Counts II-V asserted various common law and contract claims. Pet. App. 8a; JA 417-18.

boxes relevant to the claims that went to trial, JA 174–75, 179. Those four documents were never used at trial.

The verdict form divided the FCA count into ten different claims, corresponding to various periods for which Rockwell was paid. JA 548-50. The jury found for Rockwell on seven, but found for plaintiffs on the remaining three—covering only the pondcrete allegations. *Id.*; Pet. App. 9a, 50–51a.[5] The court entered judgment for both plaintiffs in the amount of $4,172,327.40. CA App. 1569.[6]

**Proceedings Related To The Original Source Rule**

Rockwell moved to dismiss Stone's claims under § 3730(e)(4). JA 73–93. Stone acknowledged that "here, [his] FCA case is 'based upon the public disclosure of allegations in ... a criminal hearing ... or from the news media.'" JA 312–13.[7] The district court agreed and held that Stone's claims were based on publicly disclosed

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[5] The jury found that Rockwell did not breach its contract with DOE, and the court dismissed the remaining non-FCA claims with prejudice. Pet, App. at 9–10a. All spray irrigation allegations corresponded to time periods as to which the jury found for Rockwell. Pet. App. 50a & n.9. It would do Stone no good to establish original source status as to the spray irrigation theories, as that would merely establish jurisdiction over claims he lost at trial. As explained *infra* note 14, courts have uniformly recognized that § 3730(e)(4)(B) requires a claim-by-claim analysis.

[6] The district court deferred Stone's motion for attorneys' fees pending appeal. Pet. App. 9a & n.2. Reversal of the judgment would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party. *See* 31 U.S.C. § 3730(d)(1) (prevailing party "shall" receive fees and costs).

[7] Stone further conceded "that some of the allegations in this case had been publicly disclosed." JA 313 n.2. Although he noted that his "claim regarding the heating and cooling of Building 250" had not been publicly disclosed, he did not (indeed, could not) deny that his pondcrete claims had been publicly disclosed. *Id.* After the verdict, Rockwell renewed its motion to dismiss. Pet. App. 9a; CA App. 1152–54. Again, Stone did not dispute that he was required to establish his status as an original source of the pondcrete claims due to the public disclosures. CA App. 1408–58. The district court adhered to the prior ruling and denied Rockwell's motion with no findings specific to Stone's knowledge of the pondcrete claims. Pet. App. 14a, 64–65a, 67a.

allegations and thus that Stone could only proceed if he "satisf[ied] the 'original source' requirement." Pet. App. 60a. Stone never argued to the contrary at any point in the district court, before the Tenth Circuit, or in his Brief in Opposition before this Court. The district court then held that Stone had satisfied his burden of proof but did not make any findings regarding Stone's direct knowledge about pondcrete—relying instead on Stone's awareness that Rockwell's compensation was tied in part to environmental compliance and on his allegation that he was generally "instructed not to divulge environmental ... problems to the DOE." Pet. App. 61a. The following paragraphs detail the evidence Stone produced as to his original source status.

1. Stone sought to prove his direct and independent knowledge through three documents: an affidavit filed with the district court, the Confidential Disclosure Statement he provided to the Government, and a one-page Engineering Order, dated 1982. Pet. App. 17–20a. The Tenth Circuit relied on these documents to conclude that Stone had reviewed "a design for the process and mechanical system intended to be used for removing sludge from" the solar evaporation ponds and had predicted "that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the 'pondcrete' blocks would rapidly disintegrate." CA App. 0509; Pet. App. 19a. Stone handwrote on the 1982 Engineering Order "[t]his design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." Pet. App. 18a; JA 228. The Court of Appeals construed this annotation as explicitly "articulating [Stone's] belief that the proposed design for making pondcrete was flawed." Pet. App. 18a.[8] This information, in turn, was found to

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[8] Although Stone's affidavit includes general statements that "the design proposed by Rockwell management for making pondcrete" was defective, the only specific defect identified was the system for piping sludge from the solar ponds. JA 175. Moreover, Stone's Confidential

"support[]" Stone's allegation that Rockwell "ultimate[ly]" made false statements about pondcrete some five years after he reviewed the Order. Pet. App. 21a.

2. Although the Tenth Circuit relied on Stone's information about predicted defects in the piping as the "bas[is]" of Stone's FCA claims, Stone never actually advanced that theory as a basis for liability in the case. (And the Tenth Circuit made no finding that he did.) The Amended Complaint did not allege that known defects in the piping system caused the blocks to fail. JA 402-06. Nor did Stone's Statement of Claims, which (like the public disclosures) instead blamed pondcrete insolidity primarily upon "an incorrect cement/sludge ratio used in [Rockwell's] pondcrete operations." JA 468-70. The Statement asserted that in late 1986, after Stone had departed and for reasons having nothing to do with any of Stone's predictions about the piping system, Rockwell *"reduc[ed] the amount of cement added to the blocks."* JA 476 (emphasis added). Although the Statement of Claims also mentioned peripheral factors such as "inadequate process controls and inadequate inspection procedures," it alleged that the reduction in cement was the *"major contributor* to the existence of insufficiently solid pondcrete blocks"—and never mentioned the supposedly defective "piping" that Stone relied upon to establish his status as an original source. JA 469-70, 477 (emphasis added).

Nor did Stone introduce any evidence of defects in the piping system at trial. Instead, the evidence centered on Rockwell's decision to reduce the amount of cement—conduct that had been publicly disclosed. The evidence established that sludge and cement were not mixed in the piping system Stone critiqued, but rather in a "pug mill" that was not installed until 1985—three years after Stone

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Disclosure Statement, which by law must include "substantially all material evidence and information" Stone possessed, *see* 31 U.S.C. § 3730(b)(2); Pet. App. 6a; JA 299, only described a defect in the piping system. JA 289–90.

made his prediction. Tr. 983–85, 2989; CA App. 1661.

Not only did plaintiffs tell the jury that reductions in the amount of cement used caused the solidification problem, Tr. 5079–80, 5128, 5135, 5144, 5161, they affirmatively told the jury that the pondcrete system itself was *not* the cause. Norman Fryback was pondcrete foreman while Stone was at the plant; his successors were Ron Teel and Dan Tallman. Tr. 980–82, 1108–09, 1638–39, 4884–85. The evidence showed that it was Teel who reduced the cement used in the pondcrete mixture. Tr. 994, 1002–03, 1041, 5079. And the Government explained that *this change alone* was responsible for the pondcrete problem, emphasizing:

> the contrast between the pondcrete produced when Mr. Fryback was foreman ... and the pondcrete that was later produced under Mr. Teel first and Mr. Tallman later. Mr. Fryback was able to get concrete hard pondcrete blocks *using the same methods* that Mr. Teel and Mr. Tallman used *with the exception of one thing, and that is the reduction of cement.*

Tr. 5177 (emphasis added). And Stone did not even contest Rockwell's assertion on appeal that Stone "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

Of course, Stone never claimed to have direct and independent knowledge of Teel's decision to reduce the concentration of cement, or of any actual insolid pondcrete blocks. He could not have known about Teel's actions because the personnel change occurred well after his departure. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); Tr. 0980–82, 1002–03, 1108–09, 4884–85. And he could not have observed actual insolid pondcrete blocks because he had left Rocky Flats before the insolid blocks were manufactured. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); *see also* Tr. 1108–09, 5177; Pet. App. 3a.

3. The district court did not find that Stone had direct and independent knowledge of any false statements actually

made by Rockwell. Nor did the Tenth Circuit purport to find any evidence in the record that Stone knew of the actual false statements. Instead, the Tenth Circuit held as a matter of law that a relator need not know of "the actual act of fraud." Pet. App. 21a. And the record contained ample evidence that Stone did *not* know of any actual fraudulent statements. All of the environmental violations and concomitant false claims alleged by plaintiffs took place long after Stone's employment with Rocky Flats ended. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). In his deposition, Stone conceded that he did not "have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government." JA 110. He further conceded that he did not know whether DOE was aware of "any of the environmental, safety, or health violations that [he was] alleging in this lawsuit." JA 111–12; *see also* JA 102–04.

**Proceedings On Appeal**

1. The Tenth Circuit held "that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete." Pet. App. 22a. The Tenth Circuit found legally irrelevant the fact that Stone did not know of any actual false claims, holding that a relator need not have direct and independent knowledge of "the actual submission of inaccurate claims." *Id.* at 21a. And the Tenth Circuit found it legally "immaterial" that Stone did not know why the pondcrete actually failed. *Id.* The Tenth Circuit merely required relators to know some background facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint." *Id.* And under that permissive test, the Tenth Circuit approved Stone as an original source based merely on his prediction that Rockwell "*would be* using a defective process for manufacturing pondcrete," irrespective of whether the problem Stone predicted "actually caused the production of malformed pondcrete blocks." *Id.* at 21–22a (emphasis added).

In its initial order, the Tenth Circuit held that Stone satisfied the voluntary production requirement of § 3730(e)(4)(B) by providing his confidential disclosure statement. *See* 2001 WL 1117107, at *12 (10th Cir. Sept. 24, 2001). On rehearing, Rockwell pointed out that under the plain language of the statute and prior Tenth Circuit precedent, the *mandatory* (b)(2) disclosure, which occurred *contemporaneously* with the filing of Stone's complaint could not satisfy (e)(4)(B)'s requirement of *voluntary* disclosure *before filing*. The Tenth Circuit agreed, and remanded for findings on this issue, holding that if "the trial judge finds there was no proper pre-litigation disclosure," the judgment for Stone would be vacated. Pet. App. 22–23a, 44a. On remand, the district court found that neither Stone's affidavit nor the FBI's 302 reports sufficed to carry Stone's burden to prove that he orally told the FBI about his pondcrete allegations before filing.[9] Pet. App. 71–74a. The court found that Stone did turn the 1982 Engineering Order over, buried among 2,300 pages of documents he produced before filing, but further found that the Order did not communicate Stone's pondcrete allegations. Pet. App. 73a. The Tenth Circuit accepted the district court's finding that Stone timely turned over the Engineering Order, but rejected the finding that it did not communicate Stone's pondcrete allegations. Pet. App. 51–52a. The Tenth Circuit held that its prior statement that the Order was "explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed" constituted law of the case.

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[9] The district court "held a hearing on November 25, 2002, at which all counsel agreed that the record was adequate to enable the judge to make the findings and conclusions necessary." Pet. App. 50a. In its December 17, 2002 findings, the court reiterated that counsel had agreed those findings "should be made based on the record contained in these submissions without the need for any additional evidentiary hearing." Pet. App. 70a. After the court issued its findings, Stone sought to supplement the record with additional affidavits. The court denied Stone's motion. Stone then filed a similar motion in the Tenth Circuit, which was denied as moot. Pet. App 53a.

Pet. App. 51a. The Tenth Circuit held that the Engineering Order was alone "*sufficient to carry Stone's burden of persuasion on this point.*" Pet. App. 52a.[10]

Judge Briscoe concurred in part and dissented in part. Pet. App. 44a. Characterizing the majority's rule as requiring only "background knowledge," *id.* at 44a, 46a, she noted that "there is *no evidence* that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, *Stone was terminated from his employment with Rockwell well before either event occurred.*" *Id.* at 46a (emphasis added). And Stone's engineering predictions were insufficient, in Judge Briscoe's view, because "it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the ... FCA claims. Rather, [those] claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began." *Id.* at 47a n.2. As evidence of Stone's ignorance, Judge Briscoe pointed out that "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome." *Id.* at 48a. Because Stone "lacked direct and independent

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[10] The district court also inferred that Stone did not communicate his pondcrete concerns in oral interviews with the FBI because the 302s did not mention pondcrete and "it is ... fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports." Pet. App. 74a. The Tenth Circuit characterized the inference that Stone never discussed the Engineering Order with the FBI as "unsound," but did not identify record evidence or make any finding that Stone actually told the FBI that pondcrete was insolid or that Rockwell was concealing pondcrete insolidity. Pet. App. 52–53a n.7. The Tenth Circuit instead held that "[t]here is no statutory requirement that the relator have emphasized the specific facts on which a claim is based, so long as the facts are disclosed"—even if they are only "disclosed" in a cryptic notation on an Engineering Order buried in a 2,300 page pile. Pet. App. 53a n.7.

knowledge of any of the essential elements" of his FCA claims, she concluded, he could not qualify as an original source. *Id.* at 47–48a. Judge Briscoe also dissented from the panel's decision after the limited remand, noting that the Engineering Order "addressed neither the failure of pondcrete when it was later produced nor Rockwell's concealment of that failure from the DOE." *Id.* at 55a.

## SUMMARY OF ARGUMENT

To prevent abuse of the False Claims Act's *qui tam* provisions, Congress barred jurisdiction where public disclosures already reveal the potential presence of fraud. This strict jurisdictional bar has one very narrow exception—for a person who has "direct and independent knowledge of the information on which the allegations are based," and who "has voluntarily provided the information to the Government before filing." 31 U.S.C. § 3730(e)(4)(B). Congress designed that exception to allow whistleblowers to share in the Government's recovery, but only if they come forward with genuinely important firsthand knowledge of the fraud.

The Tenth Circuit expanded that narrow exception so broadly that it effectively swallows the jurisdictional bar. Under the Tenth Circuit's rule, a relator need only know limited background facts "underlying or supporting" his fraud allegations, Pet. App. 21a, which in practice appears to mean any information that is just *tangentially relevant* in an evidentiary sense to the allegations on which the action is based—even if unsupported inferential leaps are required to derive even a suggestion of fraud from what the relator knows, and even if the fraud suggested by that inference is not what actually happened. That interpretation cannot be correct and greatly disserves the purpose of the statute.

The statutory requirement of "direct ... knowledge" requires the relator to have "firsthand" knowledge of the fraud, and precludes reliance on speculative predictions or large inferential leaps. The requirement of "independent" knowledge bars reliance on information that the relator would not have obtained but for the public disclosure. And

the requirement that the direct and independent knowledge must be "of the information on which the allegations are based" requires a tight nexus between what the relator claims to have known, and the specific fraud that the relator seeks to prove at trial. The statute does not specify exactly *how much* direct and independent knowledge the relator must have. Since Congress used the phrase "the information" rather than "some information," and tied it directly to the "bas[is]" of the relator's claims, the best reading is that the relator must have direct and independent knowledge of information sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment. Various courts have suggested other verbal formulations, such as that the relator must know "essential," "substantive," or "core" information relating to the particular fraud. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) ("essential"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("substantive"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) ("core"). But wherever the line is drawn, a drib and a drab "underlying or supporting" the claim is not enough; if it were, anyone even tangentially connected to a case could qualify as an original source.

Under any defensible view of the statute, the judgment below must be reversed. Stone had no "direct and independent knowledge" that Rockwell's pondcrete was insolid, or that Rockwell had represented otherwise to DOE. He left Rockwell before either the pondcrete or the statements were made. If Stone saw *any* pondcrete at all, the pondcrete he saw was "concrete hard." *See* Tr. 1108–09, 5177; Pet. App. 3a. He asserts that he *predicted*, based on his analysis of an Engineering Order, that a problem with the piping that extracted sludge from the solar ponds would later cause the cement mixed with that sludge not to harden. Predictions or inferences of this type are not

"direct and independent knowledge," and in any event that supposed prediction was irrelevant and had nothing to do with what actually happened. Variations in the consistency of sludge coming out of the piping system were normal and expected—hence Rockwell put a *human operator* there to regulate the flow of cement to compensate. Tr. 987–88, 1029–30, 1037, 1040–41. The Government stressed to the jury that it was not the machinery that failed but rather the *human operator*. Tr. 5177. The machinery, the Government conceded, was perfectly capable of producing "concrete hard pondcrete" and did so when properly used. *Id.* Nothing changed, said the Government, except "one thing, and that is the reduction of cement." *Id.* Stone had no basis for predicting that a foreman would alter the formula that had reliably produced solid pondcrete.

Stone also had no sufficient basis for any prediction or inference that Rockwell would make false claims. Stone claims that he observed that Rockwell kept getting paid despite his observation of environmental problems, and that a supervisor once told him to follow the chain of command and not contact DOE directly. In other words, he claims to have had reason to suspect that Rockwell had a general propensity or character for concealing problems—and to have inferred that that propensity would cause Rockwell not to report any problems with the pondcrete that developed years later. That inference rests on his assumption that Rockwell's conduct "remained essentially unchanged" after he left, CA App. 1526, 1530, which is entirely unreasonable for many reasons, not least of which that the legal regime governing whether pondcrete disclosures were required changed fundamentally four months after his departure. JA 52. Regardless, no trier of fact would ever be permitted to infer the existence of the specific false statements and claims at issue here from such paltry and general propensity "evidence." And if the test is whether the relator supplied "essential" or "core" evidence about the fraud, Stone obviously fails. His "evidence" predicted a sequence of events that concededly did not

occur, and was so peripheral that none of it was even presented to the jury.

Finally, the statute also requires that "the information on which the allegations are based" must have been "voluntarily provided ... to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Even if any of these speculative inferences or predictions that Stone claims to have made were sufficient to qualify as "direct and independent knowledge," they plainly were not provided to the Government. The district court found that Stone had not carried his burden of proving that he adequately disclosed whatever pondcrete information he had to the FBI. Pet. App. 71–74a. The Tenth Circuit reversed solely on the ground that Stone turned the 1982 Engineering Order over to the Government. Pet. App. 52a. A handwritten notation on that Order indicates Stone's belief that the system "will not work in my opinion," which Stone now claims was a prediction that defects in the piping system would somehow lead to insolid pondcrete. But that prediction was irrelevant, it is not apparent from the Order itself, and Stone even failed to satisfy his burden of proving that it was communicated to the Government. The Order also obviously fails to communicate any supposed inference or prediction by Stone that Rockwell would lie to cover up any pondcrete problems. The Order was also buried in a disclosure of 2,300 pages of insignificant documents, and Stone did not even show that he ever brought it to the Government's attention. The Government is not assisted when a relator buries a single cryptic needle in a 2,300 page haystack. There is no reason to indulge *qui tam* relators with such an unlikely interpretation of congressional intent.

The judgment of the Court of Appeals should be reversed, and this case should be remanded with instructions to vacate the judgment in favor of Stone, and to modify the judgment for the United States accordingly.

## ARGUMENT

As set forth, there has never been any dispute that the public disclosure bar applies on the facts at issue here. This case accordingly turns on the question whether Stone met his burden of proving that he satisfied the statutory exception for an "original source." He did not. First, Stone does not have sufficient "direct and independent knowledge of the information on which [his] allegations are based." Second, Stone did not "voluntarily provide[]" the Government with the meager direct and independent knowledge he now claims to have possessed prior to filing this action. 31 U.S.C. § 3730(e)(4)(B).

### I. THE TENTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE ORIGINAL SOURCE EXCEPTION CANNOT BE RECONCILED WITH THE SIGNIFICANT LIMITATIONS CONGRESS IMPOSED ON *QUI TAM* SUITS AFTER *MARCUS V. HESS*

The Tenth Circuit held that Stone was an "original source" because he had some limited information "supporting" the allegations, even though the information Stone claimed to know was irrelevant to, and inconsistent with, the theory of fraud actually submitted to the jury. History shows that Congress plainly intended to bar *qui tam* actions where, as here, the relator contributed (at best) only background information but lacked firsthand knowledge of the fraud.

Congress enacted the False Claims Act of 1863 to curb the fraud and price-gouging seen in the early years of the Civil War. *See* John T. Boese, 1 Civil False Claims and *Qui Tam* Actions § 1.01[A] (3d ed. 2006). The Act in its original form permitted "any person" to pursue violations of the Act, "as well for himself as for the United States." Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696. If successful, the relator was entitled to half of the Government's recovery. *Id.* § 6.

There were few reported *qui tam* cases in the decades following the Civil War. In the 1930s and 40s, however, a rash of "parasitic" suits was brought by individuals who had

no knowledge of wrongdoing besides what they had learned from publicly available sources. In one such suit, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the defendant and the United States challenged the relator's right to maintain an action under the Act on the ground that the relator based his suit upon information he had gleaned from a criminal indictment. *Id.* at 545. The Supreme Court construed the FCA to authorize the relator's action "[e]ven if ... the [relator] has contributed nothing to the discovery of" the fraud, because the Act contained "no words of exception or qualification." *Id.* at 545–46. The Court noted that Congress could have "provided specifically for the amount of new information which the informer must produce to be entitled to the reward," but it did not do so. *Id.* at 546 n.9. Justice Jackson, in dissent, conceded that "a literal reading" supported the majority's construction, *id.* at 556, but argued that Congress surely could not have "intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed." *Id.* at 558.

After the *Hess* decision, the number of parasitic *qui tam* suits skyrocketed,[11] propelling Congress to revise the statute. The House of Representatives passed a bill that would have repealed the FCA's *qui tam* provisions altogether, while the Senate voted to authorize *qui tam* actions only if they were "based upon information, evidence, and sources original with [the relator] and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it." H. R. 1203, 78th Cong., 1st Sess. (1943); *see also* S. Rep. No. 291 (1943); H.R. Rep. No. 933 (1943). The resulting

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[11] According to Attorney General Francis Biddle, nineteen *qui tam* actions were pending on March 22, 1943, eighteen of which were based entirely on information from indictments. *See* 89 Cong. Rec. 7571 (Mar. 22, 1943) (letter from Att'y Gen. Biddle to Sen. Van Nuys). By December 1943, the count had reportedly risen to 250. *See* 89 Cong. Rec. 10845–46 (Dec. 17, 1943) (statement of Rep. Walter).

compromise kept the jurisdictional bar of suits based upon evidence or information in the Government's possession but dropped the original source exception:

> The court shall have no jurisdiction to proceed with any such [*qui tam*] suit ... whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

Pub. L. No. 78-213, 57 Stat. 608, 609 (1943) (codified as 31 U.S.C. § 232(C) (1982)) (superseded).

Even though Congress dropped the original source exception from the 1943 amendments, several relators argued that such an exception should nevertheless be implied. Courts uniformly rejected that view. In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the State of Wisconsin brought a *qui tam* suit against a doctor for making fraudulent Medicare claims. Well before filing the action, the State had provided the Government with reports about the defendant's fraudulent activity as required by federal law. *Id.* at 1104. The Seventh Circuit held that the State's action was barred, observing that, "[a]lthough Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by *Hess*, the language and effect of the 1943 amendment [wa]s in fact much broader." *Id.* at 1104. The court refused to speculate "'why [Congress] struck the particular compromise it did,'" *id.* at 1105 (alteration in opinion) (citation omitted), and stated that, in light of the text, the State would have to look to Congress to exempt original sources. *Id.* at 1106.

A few months later, the National Association of Attorneys General adopted a resolution calling upon Congress "to rectify the unfortunate result of the Wisconsin v. Dean decision." S. Rep. No. 345, 99th Cong., 2d Sess., at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278. Congress amended the statute once again. This time, the original source exception made it into the law:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). Congress defined an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B).

Through these amendments, Congress sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield*, 14 F.3d at 649; *see also id.* at 651 ("The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior."); *United States ex rel. Doe v. Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) (noting that the Act is structured to prevent "opportunists" from "capitaliz[ing] on public information without seriously contributing to the disclosure of the fraud"); *Stinson*, 944 F.2d at 1154 ("principal intent" of 1986 amendments was "to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision ... and the restrictiveness of the post-1943 cases, which precluded suit even by original sources").

The need for *qui tam* actions is at its lowest ebb when enough information has been publicly revealed to put both the Government and the public on notice that a fraud may have been committed. At that point, the Government can

compel would-be relators to cooperate without a promise of a bounty. *See, e.g.*, 31 U.S.C. § 3733 (1986 amendment providing the Attorney General with authority to issue civil investigative demands to "any person" who may have "information relevant to a false claims law investigation"). Congress thus significantly restricted the ability of relators to sue after public disclosure on the belief that public pressure would then be sufficient to "lead to the prosecution of important cases and the jurisdictional bar [would] prevent relators from interfering with the government's interest if there is a legitimate reason to delay the prosecution." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684 n.4 (D.C. Cir. 1997). An expansive reading of the original source exception would disrupt the careful balance that Congress sought to achieve.

The Tenth Circuit's expansive reading is also inconsistent with Congress's decisions in the wake of *Marcus v. Hess* to erect a jurisdictional bar and, later, to provide only a limited exception. Congress expressly made the public disclosure bar jurisdictional. *See* 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction ...").[12] As this Court recently emphasized, courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Exxon Mobil Corp. v. Alpattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2620 (2005). Moreover, as an exception to a general rule, the original source exception is to be "read ... narrowly in order to preserve the primary operation" of the jurisdictional bar. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *see also Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those *plainly and unmistakably*

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[12] The jurisdictional nature of the public disclosure bar and the limited exception for original sources is confirmed by the fact that the relator's legal interest is entirely dependent upon valid assignment of the Government's claim. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). If the relator fails to satisfy the conditions of 31 U.S.C. § 3730(e)(4), then the assignment is ineffective and the relator has no standing to maintain and pursue the *qui tam* action.

within its terms and spirit is to abuse the interpretative process.") (emphasis added). Thus, to the extent that the text of § (e)(4) is subject to multiple permissible readings, courts should adopt the narrowest reasonable construction.

Unfortunately, § 3730(e)(4) "does not reflect careful drafting or a precise use of language," *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.), leading to disagreement among lower courts as to what information (and how much of it) the relator must know to qualify as an "original source." But wherever the jurisdictional lines are drawn, Stone's claim must be rejected. The Tenth Circuit's construction—under which a relator may qualify as an original source based upon nothing more than speculation and background information so disconnected from the specific fraud at issue that none of it was even presented to the jury—fails to preserve even a semblance of balance between the twin aims of the statute, and is inconsistent with Congress's sustained effort since *Marcus v. Hess* to limit *qui tam* suits to individuals with direct and fairly comprehensive knowledge of the fraud.

## II. THE TENTH CIRCUIT ERRONEOUSLY HELD THAT STONE HAD "DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION ON WHICH THE ALLEGATIONS" WERE BASED

Section 3730(e)(4)(B) is best read to require that the relator must have firsthand knowledge, independent of the public disclosures, of enough information to sustain the most critical element of his fraud claim—the allegation that the defendant submitted a false statement in support of a fraudulent claim for payment from the Government. That interpretation is the one most faithful to the text and most consistent with the twin aims of the statute.

Regardless, the judgment in favor of Stone would have to be reversed under any defensible interpretation of the statute. No other circuit besides the Tenth has allowed a relator to escape the public disclosure bar with merely some information "underlying or supporting" his fraud

allegations, and the text of the statute and governing canons of construction do not permit that interpretation.

### A. The Tenth Circuit Misinterpreted The Statutory Text

The original source exception requires courts to conduct three separate but interrelated inquiries. The Tenth Circuit misconstrued the statute at each step of the analysis.

*First*, the text requires the court to identify the core "information on which the allegations" of the relator's FCA action are "based," in order to assess the sufficiency of the relator's knowledge of that information. "[T]he information" that § 3730(e)(4) puts at issue is, most logically, the information that the relator relies upon to establish his allegation of fraud.[13] As this Court recognized in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the "basis" or

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[13] Some courts have suggested that the relator must have direct and independent knowledge of "the information" that actually formed the "basis" of the public disclosure, and not merely information that would serve to prove allegations in the relator's own action (including publicly disclosed "allegations or transactions" at issue in the relator's case). *See, e.g., United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 353–55 (5th Cir. 2003). But that interpretation fails to recognize that, sometimes, "[a]n allegation can be made public, even if its proof remains hidden." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). In those circumstances, it is impossible to determine what information the public allegation was actually "based on," which the court would have to know in order to evaluate whether the relator had direct and independent knowledge of such information. And as a policy matter it is hard to understand why Congress would want to bar a relator with sufficient direct information about the fraud, simply because the relator's information may differ from what the (unknown) disclosing party may have relied upon. Unless the Court interprets the statute to require the relator to be the actual source of the public disclosure, *see infra* Part IV, that reading is completely unworkable. Although Stone would be barred under any of these interpretations, by far the better reading is that the relator must have direct and independent knowledge of "the information" on which the allegations (including the publicly disclosed allegations) of *his* action is based. *See Mistick*, 186 F.3d at 389 (§ 3730(e)(4)(B) requires relator "to have 'direct and independent knowledge of the information on which [its fraud] allegations are based'") (alteration in original).

"foundation" of an action is its "'gravamen,'" or "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (quoting *Callejo v. Bancomer*, 765 F.2d 1101, 1109 (5th Cir. 1985)). The gravamen of an FCA claim is that the defendant made a representation to the Government that was false in order to secure payments.[14] The lower courts are in broad agreement, therefore, that the core "basis" of an FCA claim is a statement to the Government and a true state of affairs showing that statement to be false. *See, e.g., Mistick*, 186 F.3d at 385; *Springfield*, 14 F.3d at 655.

According to the Tenth Circuit, the "gravamen of Stone's claim" with respect to pondcrete was that "he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste" because the piping system used in the manufacturing process itself was "defective." *See* Pet. App. 21a. Even if that were a proper characterization of the fraud theory on which Stone's claim was based, the information he claims to have known is woefully inadequate to qualify him as an original source, as explained below. *See infra* Part II(B). More importantly, however, Stone *abandoned that theory before trial.* In their pre-trial Statement of Claims and at trial, Stone and the Government instead asserted a new theory (which is entirely inconsistent with Stone's original theory of fraud on which the Tenth Circuit relied). They alleged that Rockwell

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[14] Although the statute refers to an "action," courts have recognized that the statute necessarily contemplates that a relator's original source status must be evaluated on a claim-by-claim basis. *See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.) ("[E]ach claim in a multi-claim [*qui tam*] complaint must be treated as if it stood alone."); *Hays v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003) ("[W]e must resolve the original source issue on a claim-by-claim basis."). Otherwise, a relator could effectively avoid the jurisdictional bar by bootstrapping claims about which he has no direct and independent knowledge with claims for which he qualifies as an "original source." Thus, the relator must satisfy the requirements with respect to every theory of fraud in his action that is subject to the public disclosure bar.

committed fraud when one employee shorted the amount of cement, resulting in insolid pondcrete blocks, Rockwell hid that fact in order to secure award fees.[15] Stone's sudden change of course revealed that his supposed "direct and independent" knowledge was merely a façade. His claim morphed to restate the allegations that had appeared in the press long before he filed his action—that the pondcrete failed because of a poor cement-to-sludge ratio. The Tenth Circuit completely ignored that Stone had abandoned his original theory; it held that Stone's prediction based on alleged deficiencies in the piping system (which turned out to be both untrue and irrelevant to Stone's amended allegations) constituted "information 'underlying or supporting' his allegation concerning Rockwell's alleged ultimate fraudulent activity." *See* Pet. App. 21a.[16]

The Tenth Circuit erroneously applied the original source exception as though it were a static requirement that applied only to the theory of fraud stated in the initial complaint. Because § 3730(e)(4) is jurisdictional in nature, the requirements of the original source exception must be

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[15] Stone and the Government amended the allegations in Plaintiffs' Statement of Claims attached to the Pretrial Order, which made no mention of the piping system critiqued by Stone but rather alleged that Ron Teel, a foreman who took over after Stone left, "increased pondcrete production rates" by "reducing the amount of cement added to the blocks." JA 469-70, 476. And in any event the Federal Rules provide that, when the issues presented at trial differ from those raised in the pleadings, the pleadings are deemed amended and the issues "shall be treated in all respects as if they had been raised in the pleadings." Fed R. Civ. P. 15(b).

[16] The Tenth Circuit missed the point when it held that the original source inquiry did not turn on "whether the plaintiff's theory has merit" or "is ultimately flawed on the merits." Pet. App. 22a. In the limited circumstances where, as here, the relator fundamentally changes his allegations in a way that potentially impacts his original source status, then the court must assure itself that it retains jurisdiction over the action as amended. Whether his theory is persuasive to the jury or not is not directly relevant—except in the sense that it does a relator no good to qualify as an original source of a claim he has long since abandoned.

satisfied at all stages of the litigation. *E.g.*, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) ("The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met."); *see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). A court obviously does not have to stand watch over a relator's claim and constantly reassess jurisdiction every time there is a slight change in approach, but surely a relator cannot entirely abandon theories used to establish jurisdiction and substitute a new theory of fraud about which he has no direct and independent knowledge. As the Fifth Circuit observed in *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (1985), "the plaintiff must be held to the jurisdictional consequences of a voluntary abandonment of claims that would otherwise provide federal jurisdiction."[17]

Congress obviously did not intend for courts to ignore the fraud that actually formed the "basis" of an action and assess a relator's original source status merely by reviewing the allegations contained in a superseded initial complaint, even where the allegations change over the course of litigation. If § 3730(e)(4) were treated as a mere pleading requirement, relators could easily evade the jurisdictional bar by pleading a trivial fraud that had not been publicly disclosed (or for which they could satisfy the original source exception) while ultimately proving and recovering under much broader allegations drawn entirely from the public domain or from information only the Government possesses. The Tenth Circuit erred by accepting, as "direct and

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[17] *See also United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1164 n.10 (10th Cir. 1999) (for purposes of § 3730(e)(4) analysis, court's "main concern is [relators'] knowledge of the information on which the Second Amended Complaint is based"); *Wellness Cmty.-Nat'l v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) ("[O]ur jurisdictional inquiry must proceed on the basis of the First Amended Complaint, not the original one.").

independent knowledge of *the information on which the allegations are based*," Stone's sketchy claimed knowledge and inferences that had nothing to do with the claims of fraud ultimately alleged and presented to the jury.

*Second*, the court must determine whether the relator's knowledge of the relevant information is "direct and independent." Section 3730(e)(4)(B) "impose[s] a conjunctive requirement—direct *and* independent—on *qui tam* plaintiffs." *Springfield*, 14 F.3d at 656; *see also, e.g., Stinson*, 944 F.2d at 1160.

The lower courts are in general agreement that knowledge is "independent" if it does not "depend or rely on the public disclosures." *Findley*, 105 F.3d at 690. In other words, "a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of original source.'" *Mistick*, 186 F.3d at 389 (citation omitted).

The other circuits also agree that "in order to be 'direct,' the information must be first-hand knowledge." *Findley*, 105 F.3d at 690; *see also Stinson*, 944 F.2d at 1160 ("Direct" signifies "'marked by the absence of an intervening agency'") (citation omitted). The relator must have obtained the information through his own efforts, not through the efforts of others. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) (relators' knowledge not "direct" because "[t]hey did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else").[18]

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[18] The Government has repeatedly endorsed this very understanding of "direct knowledge." *See, e.g., United States v. Enriquez*, No. 94-4760 (11th Cir. 1994), Br. for United States at 16 ("Individuals with 'direct' knowledge are 'insiders' with 'unmediated' and 'personal knowledge' of a fraud that is being perpetrated on the government.") (citing *Wang*, 975 F.2d at 1419); *id.* ("Original sources will have 'first-hand knowledge' about the fraud, and will typically be 'individuals who are close observers or otherwise involved in the fraudulent activity.'"); *Hays v. Hoffman*, No. 01-3888 (8th Cir. 2002), Br. for United States at 21 ("A *qui tam* relator who, before the government embarked upon its own investigation, had no

Thus, courts have often disqualified relators who did not have firsthand knowledge of the actual fraud. In *Mistick*, for example, the relator knew that HUD was paying for lead paint encapsulation and that the actual work being done did not conform to HUD's standards. 186 F.3d at 381. That relator could certainly have *inferred* that a false claim was made—simply by reasoning that HUD almost certainly required a letter, statement, or certification that the contract was being performed in accordance with HUD specifications. Yet the Third Circuit found the original source rule unsatisfied because the relator did not *directly* know of the actual fraud. *Id.* at 389.

The Tenth Circuit nevertheless held that highly inferential predictions of future events qualified as "direct ... knowledge." Pet. App. 21–22a. The ordinary meaning of the phrase forecloses that conclusion. Inferences or predictions are not *knowledge*. And in ordinary legal terms, "[d]irect evidence" means "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 577 (7th ed. 2000). The analogous phrase "direct ... knowledge" must carry the same firsthand meaning. Of course, some level of inference may be permissible. A relator who watches her supervisor prepare false Medicare bills may be entitled to infer that those bills were submitted. But if "direct" is to be given meaning, the inferential portion of the relator's knowledge surely cannot outstrip his first-hand observations. "[T]he purposes of the Act would not be served by allowing a relator to maintain a qui tam suit based on pure speculation or conjecture." *United States ex rel.*

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personal knowledge of specific conduct by the defendant that violated the statute is precisely the kind of 'opportunistic plaintiff' that the public disclosure bar was intended to disqualify."); *United States ex rel. Fine v. California*, No. 93-15728 (9th Cir. 1993), Br. for United States at 17 (arguing that relator failed to satisfy the "direct" knowledge requirement because "Mr. Fine saw no fraud with his own eyes" but merely "saw reports and audits of alleged fraud, presented by various intermediaries").

*Aflatooni v. Kitsap Phys. Servs.*, 163 F.3d 516, 526 (9th Cir. 1998). The Tenth Circuit's approach permits precisely that.

*Third*, the court must determine if the relator's "direct and independent knowledge" is sufficient. The Act does not explicitly describe *how much* direct and independent knowledge the relator must possess, but the interpretation most faithful to the text is that the relator must have direct and independent knowledge sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment. In other words, the relator's information must be sufficient to sustain a finding for the relator on the core "basis" of his claims (a statement to the Government and the true state of affairs showing it to be false), if no contrary evidence is produced. That interpretation best accounts for Congress's requirement that the relator know "the information" on which his allegations are based, as opposed to "some information." *See, e.g., Rapanos v. United States*, 126 S.Ct. 2208, 2220–21 (2006) (plurality op.) ("The use of the definite article ('the') and the plural number ('waters') show plainly that § 1362(7) does not refer to water in general."). And by requiring knowledge of the information "on which the allegations are based," Congress was invoking both the legal principle that the "basis" of an action is its gravamen, *Nelson*, 507 U.S. at 357, and "the common logical distinction between an assertion and its proof," *Wang*, 975 F.2d at 1418. The most sensible conclusion, then, is that a relator must have direct and independent knowledge of enough information to permit a fact finder to infer, without legally unacceptable speculation, that a false claim was made.[19]

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[19] By contrast the public disclosure bar in subsection (A) is triggered by the public revelation of mere "allegations" or "transactions." Courts have correctly interpreted that language as requiring only a bare "allegation" of fraud or information about the transaction sufficient to alert the Government to the possibility that fraud has been committed. *See, e.g., Springfield*, 14 F.3d at 655; *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 331–32 (6th Cir. 1998).

The Third Circuit's decision in *Mistick* illustrates the correct analysis as to *what* the relator must know. *See Mistick*, 186 F.3d 376. In *Mistick*, the relator alleged that the Pittsburgh Housing Authority made false claims to the United States Department of Housing and Urban Development (HUD) regarding the cost of lead-based paint abatement at various housing projects in the city. *Id.* at 379. The Third Circuit held that the "original source" exception was not satisfied. Although the relator had direct and independent knowledge of the true state of facts, since it was the general contractor that performed all of the abatement work, *see id.* at 379, the court concluded that was insufficient by itself. In order to qualify as an "original source," the relator had to have firsthand knowledge about "the most critical element of its claims, *viz.*, that the Authority had made the alleged misrepresentations to HUD" regarding its paint abatement program. *Id.* at 388.

The Eighth, Tenth, and D.C. Circuits have held instead that § 3730(e)(4)(B) "does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent transaction." *Springfield*, 14 F.3d at 656–57; *see also United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (following D.C. Circuit); *United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (same). The Tenth and D.C. Circuits qualify a relator as an original source if he has sufficient knowledge of *either* the statement to the Government *or* the true state of affairs showing it to be false, while the Eighth Circuit requires only knowledge of falsity. *Id.* These constructions do not account for the definite article "the" preceding both "information" and "allegations" in the statute. Nor are they consistent with the scienter provision of 31 U.S.C. § 3729(b)(1)–(3). Section 3729(b) requires that a defendant have knowledge of "the information," which courts have defined as knowledge that a claim was presented and that it was false. *Hindo v. Univ. of Health Sciences/The Chicago Med. Sch.*, 65 F.3d 608, 613

(7th Cir. 1995). If a defendant must know both the statement and the true state of affairs in order to know that he is committing fraud, nothing less should allow a relator to know the defendant is committing fraud.

Further, the Eighth, Tenth, and D.C. Circuits' standard establishes a hurdle that is far too low. Many would-be relators could satisfy that relaxed requirement, even though they contributed no meaningful information to the Government or the public domain and could not have brought an action without relying upon the public disclosure. Indeed, in many cases either the fact of a representation to the Government, or, alternatively, the true state of affairs that makes that representation false, will be uncontroversial and very widely known. It is the combination of the two that may give rise to an inference of fraud in various settings, and therefore may justify giving the relator a share of the Government's recovery. Indeed, when coupled with the Tenth Circuit's willingness to treat inference or prediction as "direct and independent knowledge," that test would frequently gut the independent source requirement entirely. In certain contexts, for example, it is common knowledge that parties contracting with the Government must certify their compliance with the law. Any moderately informed lawyer or government contractor can therefore infer that a statement or claim was made, perhaps from their own experience with contracting with the Government in similar circumstances. Congress cannot have intended to permit such persons to file routine *qui tam* suits whenever, for example, news of a criminal investigation of one of their competitors hits the press.[20]

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[20] This Court has long held that informants are not entitled to statutory rewards unless they provide information that *actually assists* the government within the meaning of the statute. *See, e.g., Titus v. United States*, 87 U.S. 475, 483, 485 (1874) (informer who identified land subject to seizure did "nothing for which the statute has provided a reward" because United States already held title to that land by operation of law, and therefore informer's "[i]nformation ... could do no good"); *cf. United States v. Connor*, 138 U.S. 61, 66 (1891) ("Whoever

The Third Circuit's construction is therefore the one most consistent with the text and purposes of the statute.

Although § 3730(e)(4)(B) does not expressly require that the relator's information be sufficient to sustain the core allegation of fraud, any other standard would be subjective and difficult to apply at the outset, where it is typically not clear what the significance of certain information will be. Courts have described the necessary quantum of evidence in various ways, sometimes referring to "essential," "substantive," or "core" information, *supra* p. 17 (collecting citations), but they are in general agreement that the information must have meaningful evidentiary value in establishing the alleged fraud, and must relate in a reasonably specific way to the particular fraud alleged. *See, e.g., Stinson*, 944 F.2d at 1160 (relator must have "substantive information *about the particular fraud*) (emphasis added); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("a *qui tam* relator must have both independent and direct knowledge *of the fraudulent activity*") (emphasis added); *Doe*, 960 F.2d at 321 (FCA "encourages those *with knowledge of fraud* ... to bring that information to the fore"); *see also Hays v. Hoffman*, No. 01-3888 (8th Cir. 2002), Br. for United States at 21 (relator without "personal knowledge of specific conduct by the defendant that violated the statute is precisely the kind of 'opportunistic plaintiff' that the public disclosure bar was intended to disqualify."). "[T]he information on which the allegations are based" certainly must demand something more than simple "background knowledge" that enables the relator "to understand the significance of" the public disclosure. *Kreindler & Kreindler*, 985 F.2d at 1159; *see also Stinson*, 944 F.2d at 1160 (observing that, if background knowledge were

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claims under such an offer must bring himself within its terms."); *The Josefa Segunda*, 23 U.S. 312, 327 (1825) ("It is not permitted to parties to lie by, and allow other persons to incur all the hazards and responsibility ... and then to come in, after the peril is over, and claim the whole reward. Such a proceeding would be utterly unjust, and inadmissible.").

enough, "then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase").

The Tenth Circuit in this case embraced the far looser requirement that a relator must simply have direct and independent knowledge of some "information *underlying or supporting* the fraud allegations," Pet. App. 20–21a (emphasis added), which the Court used to mean any information *relevant to* the fraud in the ordinary evidentiary sense of making "the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed. R. Evid. 401. Although the Tenth Circuit paid lip service to the settled law that mere "background" information is not enough, its test offers no coherent distinction between background information and the "underlying or supporting" information that it deems sufficient. Indeed, the Tenth Circuit explicitly held that "the relator need not ... have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge 'underlying or supporting' the fraud allegation is sufficient." Pet. App. 21a. That formulation is easily broad enough to embrace the background information discussed in *Kreindler & Kreindler* and *Stinson*, and is inconsistent with the basic requirement imposed by other circuits that the relator's knowledge must be knowledge *of the particular fraud*. The Tenth Circuit would, for example, permit a relator to qualify on the basis of general background information about how particular government contracts are structured or how particular waste storage methods are ordinarily conducted. In this case it permitted a relator to qualify on the basis of "information" concerning the defendant's general character or propensities—which will of course open the door to every disgruntled employee or ex-employee of the defendant to claim "original source" status on the basis that they observed inappropriate conduct in other contexts. *Cf.* Fed. R. Evid. 404(b) (generally prohibiting admission of character evidence as proof of conduct).

That cannot be what Congress intended. Exceptions to a general rule are to be "read ... narrowly," *Clark*, 489 U.S. at 739, and not extended beyond "those plainly and unmistakably within [their] terms." *Phillips*, 324 U.S. at 493. Yet the Tenth Circuit's interpretation effectively reads the jurisdictional bar out of the statute. Every relator will surely be able to come up with some tidbit that "underlies or supports" his allegations in the sense of being relevant to them as an evidentiary matter—particularly if, as the Tenth Circuit held, that information need not be "knowledge of the *actual* fraudulent conduct itself." Pet. App. 21a.

### B. Stone Cannot Qualify As An Original Source Under Any Reasonable Interpretation Of The Statute

Stone cannot prevail under a correct interpretation of the statute, or under any of the plausible interpretations adopted by the other circuits. The record overwhelmingly demonstrates that Stone did not have direct and independent knowledge sufficient to show *either* the false statements on which his action was based *or* the actual facts rendering those statements false. He did not have any information that was "essential," "substantive," or "core" to establishing those issues. Indeed, he did not have any actual knowledge directly pertaining to those claims or their falsity at all.

Instead of demonstrating direct and independent *knowledge* that false statements or claims actually were made, Stone has instead repeatedly argued that he *inferred* that they must have been made from his experiences while employed at Rockwell years earlier. *See* JA 102–04 (interrogatory response inferring false statements from contract provisions). Stone bases that inference on four snippets of information (or speculation): (1) a prediction (which never came true) that pondcrete blocks manufactured by Rockwell would be insolid because of possible defects that he identified in a proposed piping system, (2) the fact that "Rockwell's compensation was based on" environmental "compliance," (3) his observation that Rockwell appeared to

get paid even though during his tenure Stone observed "various environmental, health and safety problems," and (4) an allegation that his managers instructed Stone not to take his concerns unilaterally to DOE, but instead to observe the chain of command. Pet. App. 61a. Stone argues that those facts allowed him to infer that a false claim would be submitted five years later. JA 290. That chain of inference was also the basis for Judge Carrigan's finding that Stone was an original source. *Id.*[21]

Judge Briscoe correctly explained in dissent that "although Stone ... perhaps may have speculated that Rockwell would conceal [pondcrete] problems from the government, it is apparent that he lacked the 'direct and independent' knowledge required." Pet. App. 46–47a. On certain facts there may be ambiguity in the line between inference and "direct ... knowledge," but this is not remotely a close case. Stone's personal knowledge was so disconnected from the allegations on which this action was based that his evidence was not even presented to the jury. If snippets of marginally relevant background information and implausible and speculative inferential leaps like these suffice, then the jurisdictional bar will become a dead letter.

**1. Stone did not have direct and independent knowledge of actual facts rendering Rockwell's statements or claims false.** As Judge Briscoe noted, "Stone lacked" firsthand knowledge "that Rockwell actually experienced problems in its production of pondcrete." Pet. App. 47a. If Stone saw any pondcrete blocks at all, they were "concrete hard." *See* Tr. 5177 (foreman Fryback "was able to get concrete hard pondcrete blocks"); Tr. 4884–85 (Fryback replaced in October 1986); Pet. App. 3a (Stone left Rocky Flats in early 1986). Stone's chain of inferences starts from a *prediction* that the pondcrete would be insolid

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[21] The Tenth Circuit did not address the sufficiency of Stone's inferences about the false claims, because it held that Stone need not have information about "the *actual* fraudulent submission to the government." Pet. App. 20–21a. That holding was erroneous. *See supra* Part II(A).

due to some unspecified defect in a piping system design that other Rockwell engineers proposed to use to extract sludge from the solar evaporation ponds. That prediction is insufficient to qualify Stone as an original source for three reasons.

First, Stone's inference is far too attenuated and implausible to constitute "direct ... knowledge" of fraud. The design Stone analyzed was a system for extracting sludge from solar evaporation ponds. Pet. App. 73–74a. But the final process for making pondcrete was not simply automated—human "operators control[led] the rate at which sludge" and "cement" entered the pondcrete mixing device. Tr. 987, 1029–30. Well aware that "the sludge coming out of" the extraction system would "vary in terms of its concentration of solids," the operator applied human "judgment[]," adding more or less cement "[d]epending on the sludge" to produce solid pondcrete. Tr. 987–88, 1030, 1041. Operators regulated *both* the quantity of sludge and the quantity of cement in order to achieve the proper mix. Tr. 987–88, 1037, 1040. Even if the operator erred and filled a box with an overly liquid mix, workers could manually "add some bagged cement to it and mix it up." Tr. 1048–50. Given these layers of human intervention, the piping system Stone analyzed simply could never have been the cause of insolid pondcrete, standing alone. Stone's inference that the pondcrete would be insolid is therefore not "'direct' ... knowledge" of fraud but completely unjustifiable speculation. Pet. App. 46–47a (Briscoe, J. concurring in part, dissenting in part).

Second, the speculative nature of Stone's inference is demonstrated by the fact that it was actually proven wrong and is irrelevant to (and actually inconsistent with) Stone's and the Government's own account of what actually happened. Stone predicted that Rockwell's piping machinery would produce insolid pondcrete blocks. The plaintiffs' evidence at trial proved the contrary. In closing, the Government contrasted the pondcrete produced by foreman Fryback—the foreman who was in charge during

Stone's tenure—with the pondcrete produced by foremen Teel and Tallman—who took over *after* Stone left. The Government argued that "Mr. Fryback was able to get concrete hard pondcrete using the same methods that Mr. Teel and Mr. Tallman used with the exception of *one thing, and that is the reduction of cement.*" Tr. 5177 (emphasis added). In other words, the very piping system Stone critiqued was perfectly capable of generating solid pondcrete—and, in fact, actually did so.

Stone made no effort whatsoever to prove his piping theory to the jury. No witnesses testified about Stone's predicted piping defect. His Engineering Order and its annotation were not introduced into evidence. None of the persons identified on the Order were called as witnesses. Nor did Stone dispute on appeal Rockwell's contention that he "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

Third, a prediction that a proposed process or machine will not work correctly based on scientific or engineering judgment simply cannot be a permissible basis for inferring that a statement was "false" in the sense meant by the FCA. A contrary interpretation would transform every scientific or engineering dispute into a fraud case. To hold that differences in engineering judgments can suffice to sustain an FCA claim is to fling the door open to every disgruntled engineer, doctor, or scientist whose advice is not heeded. If two doctors disagree on the proper course of treatment for a Medicare patient, the hospital does not commit fraud by submitting its bills to Medicare even if the patient eventually dies. *See, e.g., United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732–33 (7th Cir. 1999) (Easterbrook, J.) ("Only in Humpty Dumpty's world of word games would anyone apply the label 'fraud' to" statements subject to scientific or engineering disputes). Similarly here, the mere fact that Stone thought the pondcrete system would not work is not alone enough to establish fraud. "The phrase 'known to be false' in" the

FCA "does not mean 'scientifically untrue'; it means 'a lie.' ... The Act would not put either Ptolemy or Copernicus on trial." *Wang*, 975 F.2d at 1421.

In summary, Stone had no "direct and independent knowledge" of problems with the pondcrete at Rocky Flats. He had, at most, a speculative and implausible *prediction* of a problem that never materialized, and that is entirely irrelevant to the allegations on which this action is based. His claim therefore must be dismissed under any standard that requires the relator to have direct and independent knowledge that is sufficient to permit a jury to find the true state of affairs rendering any statements or claims to the Government false—or information that is "essential," or "core," or "substantive," or evidence "or of the actual fraud," any other formulation conveying the basic point that the relator must have direct and independent knowledge of meaningful information, directly related to the specific allegations that his FCA claims are based on.

**2. Stone did not have direct and independent knowledge of any relevant statements or claims.** Stone also had no direct and independent knowledge of any false statements used to support claims for payment. In response to interrogatories, Stone conceded that he did "not know the identities of specific persons who" made false statements nor "the identities of specific documents which contain" such false statements or claims. JA 102–04. In his deposition, Stone described an incident in which he believed Rockwell ordered unnecessary cooling towers—an incident that *did not* become a part of his FCA action. JA 106, 279–80. Counsel for Rockwell then asked "were there any other matters that you know of where Rockwell affirmatively represented to DOE that Rockwell was in compliance with environmental, safety, and health provisions, when it was not?" JA 106. Stone replied "I can't remember any." *Id.* Moreover, Stone's Confidential Disclosure Statement, which by law had to contain "substantially all material ... information" possessed by Stone, 31 U.S.C. § 3730(b)(2); *see also* JA 299; Pet. App. 6a, made no mention of any false

statements regarding the solidity of pondcrete or Rocky Flats' environmental record.

Stone's belief that Rockwell would lie to the Government about any pondcrete problems that emerged essentially rests on an inference of future wrongdoing from suspected prior bad acts. That speculative inference is wholly insufficient to sustain an allegation that Rockwell committed a specific fraud years later. No trier of fact could permissibly draw that inference from the information that Stone had "direct and independent knowledge" of. Stone cannot even satisfy the basic requirement imposed by other courts of appeal that the relator must have knowledge directly relating to the particular fraud alleged, as opposed to background information. Stone's inference is based on classic background; he could support any specific allegation of fraud by Rockwell with his background "information" that, in his observation, Rockwell has a propensity for fraud. If that is sufficient, then any disgruntled ex-employee who can allege that he observed a generalized tendency toward unscrupulous dealing will be an "original source" as to any future FCA claim against the company.

Stone's inference is also particularly tenuous and implausible here because it explicitly rests on the assumption "that Rockwell's [reporting] conduct was the same prior to his employment, and/or that such conduct remained essentially unchanged following plaintiff's termination with Rockwell." CA App. 1526, 1530. But Stone had no basis whatsoever for that assumption. Stone could not have developed any opinion about whether Rockwell would report a problem with insolid pondcrete, because it is undisputed that there were no problems with the pondcrete until well after his departure. Even if there had been a problem during Stone's tenure, it was not clear at that point that any disclosures would have been required. During the entirety of Stone's tenure at Rocky Flats, it was unclear whether RCRA applied at all to mixed wastes such as pondcrete—and therefore it was not clear that Rockwell's disclosure obligations covered the pondcrete. JA 52; CA App.

0790, 2031–32. It was not until July 31, 1986, four months after Stone left Rocky Flats, that DOE and EPA "entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated." JA 52. The law changed after Stone left, and Stone had no reason at all to believe that Rockwell would not conform its later disclosure practices to the newly clarified law.

## III. STONE FAILED TO PROVIDE SUFFICIENT INFORMATION TO THE GOVERNMENT AS REQUIRED BY SECTION 3730(E)(4)(B)

An original source must not only have "direct and independent knowledge of the information on which the allegations are based," but must also have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Accordingly, whatever information a relator must directly and independently know, he also must voluntarily provide to the Government before filing suit. *See, e.g., Brown v. Gardner*, 513 U.S. 115, 118 (1994) (presumption that identical words used multiple times in the same section are intended to have the same meaning is "surely at its most vigorous when a term is repeated within a given sentence").

The only disclosures germane to this inquiry are the ones that Stone made to the FBI in 1987–88. Information provided to the Department of Justice contemporaneous with the filing of a *qui tam* action pursuant to § 3730(b)(2) is irrelevant to the original source inquiry.[22] The district

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[22] No court has found that the jurisdictional prerequisite that a relator "voluntarily provide[] the information to the Government before filing an action" under § 3730(e)(4)(B) can be satisfied by filing the complaint along with a mandatory written disclosure under § 3730(b)(2). The requirements under § (b)(2) apply to *all qui tam* plaintiffs and are mandatory, whereas § (e)(4)(B) applies only to those plaintiffs seeking to proceed as original sources and the disclosure must be voluntary. Additionally, § (b)(2) requires a written disclosure contemporaneous with the filing of the complaint whereas § (e)(4)(B) requires disclosure *before* an action is filed. *See, e.g., United States ex rel. Zaretsky v. Johnson*

court found that Stone had not carried his burden to prove that he ever discussed any pondcrete allegations with the FBI. Pet. App. 71–74a. The Tenth Circuit found that Stone's production of the 1982 Engineering Order was "sufficient to carry Stone's burden of persuasion" on the voluntary production issue. Pet. App. 52a. That was error. First, the Order was entirely irrelevant to this case and does not provide the required information—a statement made in support of a claim for money and the facts that make that statement false—or even facts from which the Government could reasonably infer the required information. Second, the phrase "voluntarily provided" in § 3730(e)(4)(B) cannot be met by producing a cryptic page in a large production of documents; the would-be relator must at least bring to the Government's attention the relevant facts to be drawn from a document that would have no obvious significance in the absence of an explanation.

### A. Stone's Engineering Order Did Not Contain Sufficient Information To Satisfy § 3730(e)(4)(B)

As explained above, the predictions that Stone claims to have made from the Engineering Order did not come true, and were irrelevant to, and inconsistent with, the claims that he and the Government presented at trial. But even if this Court were inclined to indulge Stone's predictions as "direct ... knowledge" that the pondcrete would be insolid and that Rockwell would make false statements concerning the solidity of the pondcrete in order to secure payments from DOE, Stone's 1982 Engineering Order plainly does not communicate any of those inferences.

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*Controls, Inc.*, 457 F.3d 1009, 1015–16 (9th Cir. 2006) (noting that the "statutory provisions are different" and "they serve different functions"); *King*, 264 F.3d at 1280 ("It is also clear from the statutes that compliance with the disclosure requirements of § 3730(b)(2) at the time of filing does not satisfy the pre-filing disclosure requirement of § 3730(e)(4)."); *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) (same); *Findley*, 105 F.3d at 690–91 (same). In addition, the information Stone provided to DOJ would have been deficient in any event.

The simplest deficiency in the Engineering Order is the complete absence of *any* mention of a false statement or claim. The Order neither predicts nor identifies *any* false claim to the Government and thus does not disclose "the information on which the allegations are based."

The Engineering Order does not even communicate Stone's alleged conclusion that any piping problem will lead to insolid pondcrete. In his Confidential Disclosure Statement (which, as a matter of law, cannot count as a voluntary pre-filing submission), Stone states that he "foresaw that the piping system ... would lead to an inadequate mixture of sludge/waste and cement." JA 290. But that prediction is *not* reflected on the Engineering Order. The Engineering Order on its face is addressed to the process of sludge *removal*, not the subsequent process of sludge *solidification*. *See* JA 228 (Order titled "Solar Evap. Pond Sludge Removal"); *see also* JA 289 (the Engineering Order concerned "a design for the process and mechanical system intended to be used *for removing sludge from these ponds*"). The Tenth Circuit held that the Engineering Order was "explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed," Pet. App. 18a, but mere flaws in the sludge removal system are not what Stone had to disclose. Stone had to disclose that the flaws did, in fact, produce insolid pondcrete and that Rockwell concealed that fact from DOE. That information is nowhere to be found in the Engineering Order, and could not even reasonably be inferred from it. *See* Pet. App. 73a (Stone's "comment on that document does not address specifically the plans for mixing the sludge and cement to form the pondcrete blocks. ... The document does not speak for itself.").

### B. Burying A Cryptic Engineering Order In 2,300 Pages Of Documents Did Not Qualify As Voluntary Production

Section 3730(e)(4)(B)'s reference to "voluntarily provid[ing]" information must include some requirement that the relator present the information in a manner

designed to inform the Government of the salient facts. The *qui tam* statute is designed to conserve scarce Government resources by providing the Government with "genuinely valuable information." *Springfield*, 14 F.3d at 649. As this Court has recognized, the "costs of detection and investigation" are highly significant in FCA cases. *United States v. Halper*, 490 U.S. 435, 445 (1989), *overruled on other grounds, Hudson v. United States*, 522 U.S. 93 (1997). And the Senate Report acknowledged the difficulties faced by the DOJ in addressing voluminous fraud allegations. S. Rep. No. 99-345, at 4 n.10 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5269 n.10 (noting that the DOJ received 2,850 fraud referrals in 1984 and 2,734 in 1985). The voluntary production requirement exists to help reduce those costs and to address the "serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools" faced by government investigators. *Id.*[23]

Of course this Engineering Order was irrelevant to the case and does not even convey Stone's (irrelevant and ultimately disproven) predictions about the pondcrete piping. Regardless, Stone did not genuinely provide whatever information might be embedded in the Order to the Government before filing, because he buried it in 2,300 pages of documents covering dozens of unrelated allegations. There is no evidence that Stone pointed the Order out to the Government or provided any information to explain the significance of the document. As the district court found, the FBI's 302 reports about their interviews

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[23] As Congress was aware in 1986, Justice Jackson's dissent in *Hess* made the case for the level of assistance contemplated by an original source. As Justice Jackson wrote "[i]t is not shown that he ... added anything by investigations of his own, or that his recovery is based on any fact not disclosed by the Government['s investigation] itself." 317 U.S. at 558 (Jackson, J., dissenting). Congress responded, although belatedly, and enacted a provision intended to "reward those who disclose frauds otherwise concealed," *id.* at 559, and "actually and in good faith have contributed something to the enforcement of the law and the protection of the United States," *id.* at 562.

with Stone do not mention the Order and "[n]othing in [those] document[s] refers to pondcrete." Pet. App. 73a. Disregarding the function of the voluntary production requirement, the Tenth Circuit erroneously held that "[t]here is no statutory requirement that the relator have emphasized the specific facts on which a claim is based, so long as the facts are disclosed." Pet. App. 53a n.7. But the Government's ability to uncover fraud is not furthered when a relator buries a single cryptic page in a large document production. Congress meant to reward relators for providing useful information about fraud, not flooding the Government with thousands of undigested documents and then sitting back to see what the Government ultimately manages to make of them. Congress certainly did not intend to reward someone who hides a needle in a haystack, and then looks back with 20/20 hindsight to pick out a single relevant page.

In other contexts, burying a small piece of relevant data in a boxcar of irrelevancies does not count as disclosure. Courts do not tolerate such tactics in briefs—a "skeletal 'argument' ... does not preserve a claim ... when the brief presents a passel of other arguments .... Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). The SEC does not permit publicly traded companies to meet their disclosure obligations by burying a disclosure "in a voluminous document" or disclosing "in a piecemeal fashion which prevents a reasonable shareholder from realizing the 'correlation and overall import of the various facts interspersed throughout' the document." *Werner v. Werner*, 267 F.3d 288, 297 (3d Cir. 2001) (quoting *Kas v. Financial General Bankshares, Inc.*, 796 F.2d 508, 516 (D.C. Cir. 1986)); *cf. SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 67 n.4 (D.C. Cir. 1980) ("[D]isclosure may not be buried in a mass of information that, when pieced together, might give the correct impression.") (internal citation and quotation marks omitted). When a contract provision is buried in a contract "in such a way that it is not likely to come to the attention of

the other party," then it is not binding. 7-29 Corbin on Contracts § 29.9. To be effective in the tort context, a warning must "be designed so it can reasonably be expected to *catch the attention* of the consumer." *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (emphasis added). The voluntary production requirement in the original source rule should be treated no differently.

The Tenth Circuit's analysis of the voluntary production requirement of § 3730(e)(4)(B) turned entirely on its conclusion that the Engineering Order conveyed sufficient information and was properly provided by Stone. Pet. App. 52–53a. Stone otherwise wholly failed to carry his burden of proof on this point. The district court made express "findings of fact using the standard of a preponderance of evidence with the burden of persuasion being on Mr. Stone." Pet. App. 71a. In those findings, the district court closely studied Stone's affidavit and supporting documents, and found no proof "that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action." Pet. App. 73a. The Tenth Circuit found "unsound" the inference that Stone did not mention his Engineering Order in meetings with the FBI, but did not point to any record evidence sufficient to demonstrate that the district court clearly erred in finding that Stone failed to carry his burden. Pet. App. 52–53a n.7.[24] Accordingly, this Court should hold that Stone failed to satisfy § (e)(4)(B)'s voluntary production requirement

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[24] The district court drew an inference adverse to Stone from the absence of any mention of pondcrete in the FBI 302 reports. *See supra* note 10. That inference is sound. FBI internal procedures expressly demand that a 302 report be an "accurate statement[] of essential facts," that is "complete" and that does not "sacrific[e] thoroughness in order to meet deadlines." Fed. Bureau of Investigation, Manual of Administrative Operations and Procedures, Part II, § 10-17.11 (Effective 1985); *see also United States v. Harrison*, 524 F.2d 421, 425–26 (D.C. Cir. 1975) (describing procedures to "assure the accuracy of" 302 reports).

when the correct legal standard is applied to the facts found by the district court.

## IV. STONE CANNOT SATISFY THE ADDITIONAL DISCLOSURE REQUIREMENT FOUND IN SECTION 3730(E)(4)(A) UNDER THE ALTERNATIVE INTERPRETATION ADOPTED BY THE SECOND AND NINTH CIRCUITS

The Second and Ninth Circuits have read the phrase "the information" at the end of § 3730(e)(4)(A) as a reference back to the "allegations or transactions" that were publicly disclosed, which leads to the conclusion that the would-be relator must be the source *to the public discloser* prior to the public disclosure. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990) (under § 3730(e)(4)(A), a relator "must have directly or indirectly been a source to the entity [Government or otherwise] that publicly disclosed the allegations on which a suit is based"); *Wang*, 975 F.2d at 1418 ("To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit."). Petitioners agree with the majority of circuits that have rejected that view on the ground that it renders the "original source" exception superfluous, *see, e.g.*, *Mistick*, 186 F.3d at 385–88, and believe that "the information" in subsection (A) is instead a reference forward to "the information on which the allegations are based" in subsection (B). But if this Court adopts the Second and Ninth Circuit's approach, Stone loses because there is no evidence that he had a sufficient role in the public disclosure of anything. The newspaper articles cited direct reports of FBI, EPA, DOE, and GAO investigations. JA 113–40, 145–50. Agent Lipsky relied far more heavily on other sources of information than he did on Stone's communications. *See* JA 97; Lipsky Aff. ¶¶ 1.20, 6.3, 7.20–22, 8, *attached to* Defendant's Motion in Limine (Nov. 10, 1997). And the Government officials most knowledgeable at the time—the United States Attorney who led the investigation and another lead prosecutor—said there was no whistleblower and that Stone's information

had "very limited usefulness." JA 118, 343; Additional Record on Remand filed April 24, 2002, Tab 3(A), at 367. For these reasons also, Stone could not prevail under the Ninth Circuit's exception for relators that "trigger" a governmental discovery of fraud. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001).

## CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and remand this case with instructions to vacate the judgment in favor of Stone, and modify the judgment in favor the United States accordingly.

Respectfully submitted,

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# APPENDIX

## 31 U.S.C. § 3729

### § 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the

court finds that*—

(A) the person- committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property

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* For updates to dollar amounts, see Code of Federal Regulations.

which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

## 31 U.S.C. § 3730

### § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.* The complaint shall be filed in camera, shall

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* See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain

actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in

a criminal, civil, or administrative hearing, in a congressional, administrative, or Government* Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that

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* So in original. Probably should be "General".

person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative,

or Government* Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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* So in original. Probably should be "General".

Supreme Court, U.S.
FILED
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No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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*Solicitor General*
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## QUESTION PRESENTED

Whether the *qui tam* relator in this False Claims Act case was "an original source," within the meaning of 31 U.S.C. 3730(e)(4)(B), of the information on which the suit was based.

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Summary of argument ..... 15
Argument:
Because respondent Stone is an "original source" of the information on which his *qui tam* suit was based, the entry of judgment in his favor was proper ..... 18
A. Respondent Stone demonstrated "direct and independent knowledge of the information on which the allegations" contained in his original complaint were based ..... 21
1. Based on information that he had acquired as a Rockwell employee, Stone concluded that petitioner had committed widespread ES&H violations and had falsely claimed to be in compliance with ES&H requirements ..... 21
2. An individual need not personally observe the preparation or submission of specific false claims in order to qualify as an "original source" ..... 24
3. Determinations concerning the specificity with which fraud must be pleaded, and the quantum of evidence that a plaintiff must possess in order to allege that fraud has occurred, are governed by provisions of law other than 31 U.S.C. 3730(e)(4) ..... 25
4. A relator may qualify as an "original source" even if his information concerning the nature of the defendant's representations to the government is derived from publicly available materials ..... 30

Table of Contents—Continued: Page

B. Any clarification or refinement of the FCA allegations that may have occurred after the government intervened in this case is irrelevant to the "original source" inquiry ..... 39
1. The government's intervention in this case provided an independent basis for the district court to adjudicate the FCA claim filed jointly by the United States and Stone ..... 40
2. Petitioners' construction of 31 U.S.C. 3730(e)(4)(B) would hinder enforcement of the FCA by discouraging cooperation between the government and private relators ..... 42
C. Before filing his initial complaint, Stone voluntarily provided the government with the information on which his allegations were based ..... 45
Conclusion ..... 48

## TABLE OF AUTHORITIES

Cases:

*Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975) ..... 26
*Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) ..... 28
*Crandon* v. *United States*, 494 U.S. 152 (1990) ..... 32
*Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336 (2005) ..... 26
*Farrar* v. *Hobby*, 506 U.S. 103 (1992) ..... 45
*Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 3

Cases—Continued: Page

*Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039 (10th Cir. 2004), cert. denied, 125 S.Ct. 2957 (2005) ..... 36

*Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir.), cert. denied, 537 U.S. 944 (2002) ..... 34

*Rotella* v. *Wood*, 528 U.S. 549 (2000) ..... 28, 38

*United States* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005), cert. denied, No. 06-152 (Nov. 6, 2006) ..... 28

*United States ex rel. Biddle* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533 (9th Cir. 1998), cert. denied, 526 U.S. 1066 (1999) ..... 37

*United States ex rel. Detrick* v. *Daniel F. Young, Inc.*, 909 F.Supp. 1010 (E.D. Va. 1995) ..... 26

*United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) ..... 36

*United States ex rel. Feingold* v. *AdminStar Fed., Inc.*, 324 F.3d 492 (7th Cir. 2003) ..... 37

*United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997) ..... 30, 46

*United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) ..... 38, 39

*United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), cert. denied, 543 U.S. 820 (2004) ..... 28

*United States ex rel. McKenzie* v. *BellSouth Telecomms., Inc.*, 123 F.3d 935 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998) ..... 46

Cases—Continued: Page

*United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000) ..... 36

*United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.3d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993) ..... 9, 36

*United States ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509 (8th Cir. 1994), cert. denied, 515 U.S. 1142 (1995) ..... 32

*United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), cert. denied, 513 U.S. 928 (1994) ..... 37

*United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 29, 32, 33, 34, 35, 38

*United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984) ..... 33

*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 2

Statutes and rules:

False Claims Act, 31 U.S.C. 3729 *et seq.* ..... *passim*

31 U.S.C. 3729(a) ..... 2

31 U.S.C. 3729(a)(1) ..... 2

31 U.S.C. 3729(a)(2)-(7) ..... 2

31 U.S.C. 3730(a) ..... 2

31 U.S.C. 3730(b)(1) ..... 2

31 U.S.C. 3730(b)(2) ..... 2

31 U.S.C. 3730(b)(3) ..... 2

31 U.S.C. 3730(c)(1) ..... 42, 44

Statutes and rules—Continued: Page

31 U.S.C. 3730(c)(3) ..... 2
31 U.S.C. 3730(d) ..... 3
31 U.S.C. 3730(d)(1) ..... 3, 42, 44
31 U.S.C. 3730(d)(2) ..... 3
31 U.S.C. 3730(e)(4) ..... *passim*
31 U.S.C. 3730(e)(4)(A) ..... *passim*
31 U.S.C. 3730(e)(4)(B) ..... *passim*
Fed. R. Civ. P.:
Rule 8 ..... 20
Rule 8(a)(2) ..... 26, 27, 28
Rule 9 ..... 20
Rule 9(b) ..... *passim*
Rule 11 ..... 20, 26, 28
Rule 11 (1998) ..... 26
Rule 11(b) advisory committee's note (1993) (Amendment) ..... 27
Rule 11(b)(3) ..... 15, 26, 27, 29, 34
Rule 11(c) advisory committee's note (1993) (Amendment ) ..... 27
Rule 12(b)(6) ..... 29
Rule 56 ..... 20, 28, 29, 34

# In the Supreme Court of the United States

No. 05-1272

ROCKWELL INTERNATIONAL CORP., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-55a) is not published in the *Federal Reporter* but is reprinted in 92 Fed. Appx. 708. An earlier opinion of the court of appeals (Pet. App. 1a-48a) is reported at 282 F.3d 787. The opinions of the district court (Pet. App. 58a-63a, 66a-68a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 2004. A petition for rehearing was denied on January 4, 2006 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on April 4, 2006, and was granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits an array of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A person who violates the FCA "is liable to the United States Government for a civil penalty * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and penalties may be brought either by the Attorney General or by a private person (known as a relator) in the name of the United States in an action commonly known as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 768-770 (2000). When a *qui tam* action is brought, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. 3730(b)(2). "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, and the court may extend the 60-day period upon a showing of good cause, 31 U.S.C. 3730(b)(3). If the government initially declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the gov-

ernment and the relator. 31 U.S.C. 3730(d). If the government has intervened in the action, the relator shall "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. 3730(d)(1).[1] The relator in such a case "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." *Ibid.*

The FCA's "public disclosure" provision states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

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[1] If the government does not intervene and the *qui tam* suit produces a monetary recovery, the relator receives "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." 31 U.S.C. 3730(d)(2).

2. From 1975 through 1989, petitioner Rockwell International Corporation operated the Rocky Flats nuclear-weapons facility pursuant to a contract with the Department of Energy (DOE).[2] Under the contract, DOE paid petitioner on a cost-plus fee basis. DOE reimbursed petitioner for allowable costs that petitioner incurred in operating the plant, and petitioner received an annual base fee derived using a predetermined percentage of the contract's overall value. In addition, petitioner received a semiannual bonus based on DOE's evaluation of petitioner's performance in areas that included environmental, safety, and health (ES&H) operations. Pet. App. 2a-3a.

From November 1980 until March 1986, respondent James S. Stone worked as a Principal Engineer in the Facilities, Engineering, and Construction Division at Rocky Flats. Pet. App. 3a. After Stone's employment with the company terminated, he informed a Special Agent of the Federal Bureau of Investigation (FBI) that environmental crimes had allegedly been committed at Rocky Flats during the period of Stone's employment. *Id.* at 3a-4a. Based in part upon the information that Stone provided, the Special Agent prepared an affidavit and obtained a warrant to search the Rocky Flats facility. *Id.* at 4a; see J.A. 94-101, 429 (excerpts from warrant affidavit). The search was conducted on June 6, 1989. Pet. App. 4a. The Special Agent's affidavit was unsealed three days later, and the allegations of environmental violations at Rocky Flats received substantial media coverage. *Ibid.*; see J.A. 113-168 (June 1989 newspaper articles).

3. a. On July 5, 1989, approximately one month after the search of the Rocky Flats facility, Stone filed this *qui tam* action against petitioner. See J.A. 38-49 (complaint).

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[2] Petitioner Rockwell was renamed Boeing North American, Inc., see Pet. Br. ii, after the events that gave rise to this litigation.

Stone's complaint alleged that petitioner, "from about November 1980 and continuing thereafter, has committed and is presently committing numerous and repeated violations of" various federal and state ES&H laws and agreements. J.A. 43-44. Stone further alleged that petitioner had

> knowingly concealed and intended to conceal the true nature of its numerous and continuous violations of [environmental and safety laws and agreements], with the intent to induce the Government to make and continue to make payments to [petitioner] in connection with the operation of Rocky Flats Plant. Had the Government known the true nature and extent of [petitioner's] violations, as well as its concealment of said violations, it would not have made payments and continued to make payments to [petitioner].

J.A. 46.

Stone's complaint asserted an FCA claim for relief premised on those allegations. J.A. 46-47. The FCA claim alleged that petitioner had obtained "payments and approvals from the United States Government in connection with its operation of the Rocky Flats Plant," and that the government had made such "payments and approvals * * * in reliance on false information, documents, reports, and statements made by [petitioner]." J.A. 47; see Pet. App. 5a-6a. While Stone's FCA action was pending, the government conducted a criminal investigation into petitioner's management of Rocky Flats, which culminated in March 1992 in a plea agreement in which petitioner pleaded guilty to ten environmental violations. *Id.* at 6a-7a; see J.A. 50-72 (plea agreement and statement of factual basis).

b. In December 1992, after the government had initially declined to intervene in Stone's *qui tam* action, see J.A. 350, petitioner moved to dismiss Stone's complaint for want of jurisdiction. J.A. 73-93. Under the FCA, a court lacks

jurisdiction over a *qui tam* suit that is "based upon" publicly disclosed "allegations or transactions" in specified fora unless the relator is an "original source of the information." 31 U.S.C. 3730(e)(4)(A); see p. 3, *supra*. Petitioner contended that Stone's complaint was based upon information that had been publicly disclosed through (i) the FBI agent's search warrant application and affidavit and (ii) subsequent reports in the news media. See J.A. 75-78, 83-85.

Petitioner further contended (J.A. 85-92) that Stone could not qualify as an "original source" because he lacked the requisite "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B); see p. 3, *supra*. Petitioner did not contend that Stone lacked "direct and independent knowledge" of the ES&H violations that petitioner was alleged to have committed. Rather, petitioner argued that Stone lacked the requisite knowledge of the alleged fraudulent requests for payment. Thus, petitioner asserted:

> Stone has admitted that he not only lacks the "direct and independent" knowledge of false statements/concealments required by the FCA; he lacks *any* knowledge of such misconduct. Specifically, Stone has admitted that he cannot identify: (1) a single Rockwell employee who falsely told the Government that Rockwell was in compliance with the ES&H provisions; (2) a single Rockwell employee who concealed ES&H violations from the Government; (3) a single document which falsely stated that Rockwell was in compliance with the ES&H provisions; or (4) a single document indicating that Rockwell concealed ES&H violations from the Government. Stone has also admitted that [he] has no personal knowledge regarding [petitioner's] presentation to the Government of claims for payment for the operation of Rocky Flats. * * * Under these circumstances

> Stone cannot possibly satisfy the FCA's "direct and independent knowledge" test.

J.A. 92.[3]

c. Stone filed an opposition, supported by an additional affidavit, to petitioner's motion to dismiss. See J.A. 169-183. The affidavit stated that Stone's duties during his six years at Rocky Flats "included plant-wide 'troubleshooting' and the review of designs and existing operations for safety and cost effectiveness." J.A. 170. The affidavit then described in detail, with reference to contemporaneous documents appended to the affidavit, Stone's experiences monitoring ES&H issues during the period that he was employed by petitioner, J.A. 171-179, including the process of manufacturing "pondcrete," a mixture of cement with the sludge and liquid from evaporation ponds at Rocky Flats

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[3] Approximately two years before moving to dismiss Stone's complaint for lack of jurisdiction under 31 U.S.C. 3730(e)(4), petitioner had moved to dismiss Stone's *qui tam* claim for failure to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b). See Br. in Supp. of Rockwell's Mot. to Dismiss 2 (filed Dec. 28, 1990). Like the later-filed motion under Section 3730(e)(4), the Rule 9(b) motion relied on the fact that Stone had failed to identify specific false claims. The district court denied that motion, see Aug. 8, 1991, Order 2-3, stating:

> In *qui tam* actions, the plaintiff does not allege that he or she was personally defrauded by the defendant, but rather that the defendant defrauded a third party. Thus, at the time the complaint is filed, the plaintiff may not have had access to the information required by Rule 9(b). Requiring *qui tam* plaintiffs to provide the level of detail "normally" required under Rule 9(b) would be contrary to the policy that the federal rules of civil procedure are to be construed liberally in the interest of attaining justice.

*Id.* at 2. The court also stated that "Rule 9(b) must be read in conjunction with Rule 8's requirement that a pleading contain a 'short and plain statement of the claim.' " *Id.* at 3.

that he had learned contained toxic wastes, J.A. 174-175. Stone explained that he had reported to Rockwell management concerns that the proposed pondcrete process would not work, but that Rockwell went forward with the project without making changes necessary to eliminate the insolidity of the pondcrete blocks. J.A. 175.

The affidavit further explained that Stone had learned during his period of employment that (i) "[petitioner] could and did earn substantial 'bonuses' every six months for its operations of the plant," J.A. 179, and (ii) petitioner's entitlement to such bonuses depended on its compliance with applicable ES&H laws, J.A. 180. Stone appended a document that he had received while employed at Rocky Flats that described the process by which Rockwell could earn bonuses. *Ibid.*; see J.A. 247-249 (appended document). That document identified subject areas, including environmental protection and waste management, for which a satisfactory performance was required in order to receive an award fee under the contract. See J.A. 180, 248-249; see also Pet. App. 61a. The affidavit also stated that Stone had been instructed by his superiors within the company that he "should not discuss the environmental, health and safety problems that [he] was discovering with representatives of [DOE] or any other agency of the government." J.A. 180.

d. The district court denied petitioner's motion to dismiss. Pet. App. 58a-63a. The court first held that the allegations in Stone's complaint were "based upon" a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A) because those allegations "involve[d] incidents that were widely covered in the news media." Pet. App. 60a. For that reason, the court explained, Stone was required to demonstrate that he was an "original source" under 31 U.S.C. 3730(e)(4)(B) in order for his *qui tam* suit to go forward. Pet. App. 60a. The court observed, in that regard, that the

"'original source' requirement applies even if a *qui tam* plaintiff's allegations are based only partly upon publicly disclosed allegations or transactions." *Id.* at 59a-60a (citing *United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993)).[4]

The district court concluded that Stone qualified as an "original source" even though he could not identify the specific individuals who had made misrepresentations to the government on petitioner's behalf or the specific documents in which those misrepresentations had been made. See Pet. App. 60a-61a. The court explained that, in the course of his employment at Rocky Flats, Stone had "gained knowledge of various environmental, health and safety problems"; had been "informed that [petitioner's] compensation was based on compliance with applicable environmental, health and safety regulations"; and had been "instructed not to divulge environmental, health and safety problems to the DOE." *Id.* at 61a. The court concluded that Stone "had direct and independent knowledge that [petitioner's] compensation was linked to its compliance with environmental, health and

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[4] In *Precision Co.*, the Tenth Circuit explained that, under 31 U.S.C. 3730(e)(4), "the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." 971 F.2d at 552. The court in *Precision Co.* further held that the relator's allegations were "based upon * * * public disclosure[s]" within the meaning of Section 3730(e)(4)(A) because those allegations were substantially identical to allegations made in prior civil litigation involving a different plaintiff. See *id.* at 553-554. Thus, under applicable Tenth Circuit precedent, petitioner was not required to demonstrate in this case that Stone had actually relied on media reports in formulating his complaint. Rather, for purposes of establishing that Stone's suit was "based upon" a "public disclosure," it was sufficient under Tenth Circuit precedent that a significant overlap existed between Stone's allegations and allegations already in the public domain. See p. 36 & note 15, *infra*.

safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Ibid.* The court held on that basis that Stone had the requisite "direct and independent knowledge of the information on which the allegations are based" and therefore qualified as an "original source." *Ibid.*

4. In November 1995, the United States moved to intervene in Stone's *qui tam* action. J.A. 347-348. In support of that motion, the government submitted affidavits prepared by a Justice Department attorney, who described the sequence of events through which the government had acquired additional relevant information after its initial decision not to intervene. See J.A. 349-381. The affidavits explained that the additional information had been obtained through (i) discovery conducted by the government in a civil breach-of-contract suit filed by petitioner against DOE in the Court of Federal Claims, see J.A. 350-351, (ii) documents provided by Stone's counsel, see J.A. 351-352, and (iii) documents created during the criminal prosecution of petitioner (see p. 5, *supra*) and subsequently provided to Civil Division personnel, see J.A. 366-367.

In November 1996, the district court granted the government's motion to intervene. J.A. 382-388. In holding that the government had established "good cause" to intervene at that date, the court explained that the government's declarations "persuasively show that information obtained during discovery in the claims court case and made available to [the declarant] by counsel for Mr. Stone have been important to the decision to intervene." J.A. 388; see J.A. 387-388.

The following month, the United States and Stone jointly filed an amended complaint. J.A. 395-426. In Count 1 of the complaint, both the United States and Stone alleged that petitioner had violated the FCA by falsely repre-

senting to DOE that it was in compliance with applicable ES&H requirements, and by obtaining increased award fees and other payments on the basis of those misrepresentations. See, *e.g.*, J.A. 402, 416. The amended complaint described in some detail specific types of ES&H violations that petitioner was alleged to have committed. See J.A. 402-412. Those violations included improper production and storage of pondcrete and saltcrete, another form of processed hazardous waste. See J.A. 402-406. The United States (but not Stone) also asserted a variety of common-law claims, see J.A. 417-418, and Stone (but not the United States) asserted an additional FCA claim that alleged improper handling of other toxic substances, including plutonium. See J.A. 418-424.[5]

At the ensuing jury trial, "[t]he main issue * * * was whether [petitioner] concealed from DOE environmental, safety, and health problems related to the processing and storage of saltcrete and pondcrete." Pet. App. 9a. The jury found that petitioner had violated the FCA during each of three consecutive 6-month periods beginning April 1, 1987. J.A. 548-549.

After the jury rendered its verdict, petitioners, relying on the "public disclosure" bar contained in 31 U.S.C. 3730(e)(4), urged the district court to enter judgment solely in favor of the United States and not in favor of Stone. See J.A. 569. The United States opposed that request. See J.A. 568-572. The government explained that its conduct of the litigation had been "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys," and that "[t]he allegations actually tried clearly came within the gravamen of Mr. Stone's [original] complaint." J.A. 570. The govern-

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[5] Stone's claim concerning plutonium was severed from the rest of the suit by the district court, and it has not yet been tried. See Pet. App. 8a-9a, 67a; J.A. 562-563.

ment stated that "the narrowing that occurred in this case" was "done at the government's behest for tactical litigation reasons" and "did not transform the case into a 'different case.'" *Ibid.*

The district court determined that it would "adhere to the ruling previously made in the case, and say that James Stone is properly a relator under the False Claims Act." Pet. App. 65a.[6] The court subsequently entered judgment in favor of the United States and Stone in the amount of $4,172,327. *Id.* at 10a; see J.A. 30. The court reserved its ruling on Stone's request for attorneys' fees and expenses pending the disposition of any appeals. J.A. 578.

4. The court of appeals affirmed in part and remanded the case to the district court for additional findings on one aspect of the "original source" question. Pet. App. 1a-48a.

a. The court of appeals held that Stone had established the "direct and independent knowledge of the information on which the allegations are based" (31 U.S.C. 3730(e)(4)(B)) that a relator is required to possess when a *qui tam* suit is based upon publicly-disclosed information. Pet. App. 11a-22a. The court stated that, to satisfy the FCA's "direct and independent knowledge" requirement, "the knowledge possessed by the relator must be marked by the absence of an intervening agency and unmediated by

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[6] At a hearing to address issues concerning the proper scope of the judgment, the district court stated:

> [T]he division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone, and as of now, as far as I'm aware, there's no dispute about that. * * * [Petitioner] has to pay, and how the government and Mr. Stone divide it up is up to them. If there were to be a dispute, it would be up to me, but I'm not here to generate disputes that don't exist.

J.A. 577.

anything but the relator's own labor." *Id.* at 15a (ellipses, brackets, internal quotation marks, and citation omitted). The court rejected petitioner's contention that an "original source" must have "direct and independent knowledge of the actual fraudulent submission to the government." *Id.* at 20a. Rather, the court explained, under the "plain text" of the FCA, a relator "need only possess 'direct and independent knowledge of the *information on which the allegations are based*.'" *Ibid.* (quoting 31 U.S.C. 3730(e)(4)(B)).

The court of appeals also rejected petitioner's contention that "Stone could not be an original source for the pondcrete claim because he no longer worked at Rocky Flats when the manufacture of pondcrete blocks commenced." Pet. App. 21a. The court explained:

> The gravamen of Stone's claim is that he learned from studying [petitioner's] plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case [petitioner's] awareness that it would be using a defective process for manufacturing pondcrete.

*Ibid.*

b. In addition to possessing "direct and independent knowledge of the information on which the allegations are based," an "original source" must "voluntarily provide[] the information to the Government before filing" an action under the FCA. 31 U.S.C. 3730(e)(4)(B). The court of appeals concluded that the record was insufficient to enable it to determine whether Stone had satisfied that requirement. Pet. App. 22a. The court therefore remanded the case to

the district court for additional proceedings to resolve that question. *Id.* at 22a-23a.[7]

d. Judge Briscoe concurred in part and dissented in part. Pet. App. 44a-48a. Judge Briscoe would have held that Stone failed to qualify as an "original source" because the record contained "no evidence that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or [petitioner's] efforts to conceal those problems from the DOE." *Id.* at 46a.

5. On remand, the district court issued additional findings and conclusions pursuant to the court of appeals' order. Pet. App. 69a-76a. The court noted that Stone had "concede[d] that he did not provide any information to any government representatives concerning claims relating to saltcrete." *Id.* at 70a. With respect to pondcrete, the district court found, inter alia, that Stone had submitted to the government an engineering order with Stone's handwritten notation commenting on the design of one particular aspect of Rockwell's proposed toxic waste removal system. *Id.* at 72a-73a. The handwritten notation stated: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation." *Id.* at 73a. In accordance with its understanding of the limited scope of the remand order, the district court declined to determine the legal significance of its findings. *Id.* at 75a.

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[7] Petitioner also raised various constitutional challenges to the *qui tam* provisions of the FCA. The court of appeals rejected those contentions. Pet. App. 23a-29a. The petition for a writ of certiorari sought review of the Tenth Circuit's rulings on the constitutional issues, see Pet. 24-30, but this Court limited its grant of certiorari to the "original source" question, see 127 S. Ct. at 35.

6. The court of appeals affirmed the judgment in favor of the United States and Stone. Pet. App. 49a-55a. In concluding that Stone had adequately apprised the government of the allegations on which his *qui tam* suit was based, the court attached "critical importance" to the engineering order with Stone's handwritten notation. *Id.* at 51a.

Judge Briscoe dissented, again expressing the view that Stone did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B). Pet. App. 53a-55a.

## SUMMARY OF ARGUMENT

A. With respect to the allegations set forth in Stone's original *qui tam* complaint, Stone qualified as an "original source" because he demonstrated the requisite "direct and independent knowledge" of the information that underlay those allegations. As a Rockwell employee, Stone observed extensive ES&H violations committed by the company. Although Stone did not observe the submission of false claims during his period of employment, he learned facts as a Rockwell employee from which he reasonably inferred that petitioner had represented itself to be in compliance with ES&H requirements. Because Stone based his own allegations on information that he acquired as a Rockwell employee, he satisfied the "direct and independent knowledge" requirement of 31 U.S.C. 3730(e)(4)(B).

While there are limits on a relator's freedom to premise his FCA claims on logical inferences from personal observations, those limits are imposed not by 31 U.S.C. 3730(e)(4)(B), but by *other* provisions of law that are not currently at issue here. Petitioners have not contended that Stone's FCA allegations lacked "evidentiary support" within the meaning of Federal Rule of Civil Procedure 11(b)(3). Although petitioner argued in the district court that Stone had failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b), the dis-

trict court rejected that contention, and petitioners have not pursued it. Section 3730(e)(4)(B) does not impose a heightened-pleading requirement, and it does not require a relator to have more extensive or more specific knowledge of fraud than the Federal Rules would otherwise require.

Petitioners' construction of 31 U.S.C. 3730(e)(4)(B), under which an "original source" must have "direct and independent knowledge" both of specific claims and of information showing those claims to be false, would subvert the balance that Congress struck between encouraging private assistance to the government's anti-fraud efforts, providing appropriate incentives and rewards for deserving relators, and discouraging opportunistic *qui tam* suits. A relator who learns of the defendant's claims to the government only through publicly-available materials, but who has personal knowledge of significant information that shows those claims to be false, may contribute substantially to the detection and remediation of fraud. Indeed, the relator's knowledge of the root source of the fraud can lead to a government investigation, which in turn can lead to public disclosures that make clear that fraudulent demands for payment were made. Nothing in the logic or text of Section 3730(e)(4) suggests that the provision should be read to deny a recovery to the person whose actions led to the discovery of the fraud. Section 3730(e)(4)(A)'s "public disclosure" provision is intended to apply broadly and can be expected to encompass many *qui tam* suits that would significantly assist the government's efforts to redress fraud. An unduly narrow construction of the term "original source" would subvert the balance struck by Congress between encouraging citizen assistance to the government's anti-fraud measures and discouraging opportunistic suits.

B. If Stone was an "original source" of the information on which his initial *qui tam* complaint was based, the district court was not required to conduct any further "original source" analysis with respect to the FCA claim asserted in Count 1 of the amended complaint and litigated at trial after the government intervened. When an FCA action is "based upon" a covered "public disclosure," the action may go forward *either* if the suit is "brought by the Attorney General" *or* if the private plaintiff qualifies as an "original source." 31 U.S.C. 3730(e)(4)(A). Because the FCA claim on which petitioners were ultimately held liable was asserted jointly by the United States and Stone, that claim was "brought by the Attorney General" within the meaning of Section 3730(e)(4)(A). It was therefore unnecessary for the district court to determine whether Stone was an "original source" of the information underlying the specific theory of liability on which the government and Stone prevailed at trial.

If the government had regarded the successful pondcrete claims as "new" claims not encompassed by Stone's complaint, it could have argued on that ground that Stone was not entitled to any portion of the government's recovery. A dispute of that nature may arise whether or not an FCA suit is "based upon" any "public disclosure." In this case, however, the government urged the district court to include Stone in the favorable judgment. The government explained that its litigation efforts had been assisted by Stone and his attorneys, that Stone's earlier allegations encompassed the FCA claim litigated at trial, and that the legal theories presented to the jury had been narrowed and refined at the government's behest. To require Stone to demonstrate his "original source" status anew, with respect to the precise theory of liability on which the government ultimately focused at trial, would create artificial disincen-

tives to cooperation between the government and private relators.

C. There is no merit to petitioners' contention that Stone failed to provide the government with the information on which his *qui tam* suit was based. A relator satisfies the prior-disclosure obligation imposed by 31 U.S.C. 3730(e)(4)(B) so long as he tells the government what he knows, and petitioners do not contend that Stone withheld significant information from federal officials. In any event, Stone's disclosures were extensive in an absolute sense, involving repeated meetings with federal officials and the submission of more than 2300 pages of documents. Petitioners' contention that Stone was required to identify extensive *pondcrete-related* disclosures is mistaken, since it is premised on their incorrect view that the district court was required to conduct a new "original source" analysis with reference to the specific theory of liability that prevailed at trial.

## ARGUMENT

### BECAUSE RESPONDENT STONE IS AN "ORIGINAL SOURCE" OF THE INFORMATION ON WHICH HIS *QUI TAM* SUIT WAS BASED, THE ENTRY OF JUDGMENT IN HIS FAVOR WAS PROPER

Petitioners contend (Br. 17) that, in order to qualify as an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B), a *qui tam* relator "must have direct and independent knowledge of information sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment." In petitioners' view, respondent Stone's knowledge was deficient because he did not personally observe any specific requests for payment in which petitioner falsely represented that it was in compliance with applicable

ES&H laws, and because Stone was not personally familiar with the specific environmental violations (*i.e.*, the releases of toxic substances into the environment as a result of the inadequate cement content of petitioner's pondcrete) that underlay the jury's ultimate liability determination. Petitioners' argument reflects a misunderstanding of Section 3730(e)(4)(B)'s text and purpose, and acceptance of their proposed standard would largely eviscerate the "original source" provision.

Petitioners insist that the relator must have—before the complaint is even filed—"direct and independent knowledge" of information sufficient to support judgment in the relator's favor. But nothing in the "original source" requirement suggests such a deviation from the normal rules of civil procedure. To the contrary, the statutory definition of "original source" refers to the "information on which [the relator's] *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). The "original source" inquiry thus focuses on the allegations at the complaint stage and does not limit recovery to a relator who has no need for discovery. The analysis in this case should therefore focus on the claims and factual averments actually asserted in Stone's original complaint.

In the instant case, Stone clearly qualified as an "original source" because his information concerning *both* petitioner's representations to the government *and* the company's actual ES&H violations was acquired through his experiences as a Rockwell employee, "direct[ly] and independent[ly]" of any "public disclosure." In arguing that Stone lacked sufficient firsthand knowledge concerning petitioner's claims for payment, petitioner contends in substance that Stone's *total* body of knowledge on this point was inadequate—not that Stone acquired the necessary quantum of relevant information through means that were

other than "direct and independent." The question whether Stone's information about petitioner's claims for payment was a sufficient predicate for an FCA suit, however, is governed by Federal Rules of Procedure 8, 9, 11, and 56, not by 31 U.S.C. 3730(e)(4).

Even if Stone had acquired his information about petitioner's billing practices from public sources, he would not thereby be disqualified as a *qui tam* relator. When a relator has firsthand knowledge of substantial information showing that the defendant's claims for government funds or property are knowingly false, the relator may qualify as an "original source" even if his knowledge of the claims themselves is derived from publicly available materials. Disqualification of potential relators under those circumstances is in no way compelled by the statutory text, and it would disserve the purposes that underlie the "original source" exception to the "public disclosure" bar. See pp. 30-39 *infra*.

To the extent that Stone's prior allegations were refined or clarified after the government intervened, no new "original source" inquiry was necessary or appropriate. The FCA claim on which petitioner was ultimately held liable was pursued jointly by the United States and Stone, and the government's assertion of the claim provided an independent basis for the district court's exercise of jurisdiction. The courts below therefore were not required to determine whether Stone possessed "direct and independent knowledge" of information concerning the precise theory of liability on which the co-plaintiffs ultimately prevailed.

### A. Respondent Stone Demonstrated "Direct And Independent Knowledge Of The Information On Which The Allegations" Contained In His Original Complaint Were Based

#### *1. Based on information that he had acquired as a Rockwell employee, Stone concluded that petitioner had committed widespread ES&H violations and had falsely claimed to be in compliance with ES&H requirements*

In his initial *qui tam* complaint, Stone alleged that petitioner had committed frequent and recurring violations of various federal and state ES&H laws over an extended period of time. J.A. 42-44. Stone further alleged that, by concealing those violations and by misrepresenting the relevant facts, petitioner had induced the United States to make payments in connection with the Rocky Flats Plant that the government would not have made if it had been aware of petitioner's misconduct. See J.A. 46, 47. Thus, petitioner broadly alleged:

> From at least November 1980 to the present [July 1989] *all* monies and payments approved on application of [petitioner] and/or received by [petitioner], including annual guaranteed fees, bonuses awarded due to [petitioner's] performance, and reimbursement of the expenses and costs of operating the Rocky Flats Plant, in a total amount presently unascertained, were so applied for and received by defendant with the knowledge and intention on defendant's part to defraud and deceive the United States Government, all in violation of the False Claims Act.

J.A. 45-46 (emphasis added). The complaint did not identify specific documents in which petitioner had falsely represented that it was in compliance with applicable ES&H requirements.

Although the *qui tam* complaint alleged that Stone was an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B) of the information on which the suit was based, see J.A. 41, the complaint itself did not explain how Stone had determined that petitioner had obtained federal funds through concealments and misrepresentations concerning ES&H compliance. After petitioner moved to dismiss the complaint under 31 U.S.C. 3730(e)(4), however, respondent Stone submitted an affidavit in which he discussed how his experiences as a Rockwell employee at the Rocky Flats Plant had led him to that conclusion. See J.A. 169-183. The affidavit explained that, "during [his] six-year tenure at Rocky Flats, [Stone] was assigned to numerous projects that required [him] to learn about, and recommend solutions for, various environmental, health and safety issues at the plant." J.A. 170. The affidavit recounted in detail Stone's experiences monitoring ES&H issues during that period. J.A. 171-179. In particular, the affidavit described various instances in which Rockwell management had declined to take ameliorative action even after Stone had identified serious environmental problems at the plant. See J.A. 174, 175, 176, 178, 179.

The affidavit also explained Stone's bases for concluding that petitioner had made false representations of compliance with applicable ES&H laws. Stone attested that he had learned during his period of employment that, "under its contract with the United States, [petitioner] could *and did* earn substantial 'bonuses' every six months for its operations of the plant." J.A. 179 (emphasis added). Stone further stated:

> I also learned during my employment at Rocky Flats that, under its contract with the United States, [petitioner] was required to operate Rocky Flats in accordance with federal, state and local environmental,

> health and safety laws. In addition, I learned that [petitioner's] compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." * * * I understood * * * that [petitioner] would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

J.A. 180; see J.A. 247-249; Pet. App. 61a. The affidavit also stated that Stone had been instructed by his superiors within the company that he "should not discuss the environmental, health and safety problems that [he] was discovering with representatives of [DOE] or any other agency of the government." J.A. 180.

Because Stone was aware both that award bonuses were contingent on satisfactory ES&H performance and that petitioner had received such bonuses for its operation of the Rocky Flats plant, Stone could reasonably infer that petitioner had represented to the government that it was in compliance with applicable ES&H requirements. Stone's observation of recurring ES&H violations at the Rocky Flats plant, which (according to Stone's affidavit) continued unabated even after Stone brought them to the attention of Rockwell management, supported the further inference that those representations were false. The conclusion that petitioner had misled the government was reinforced by the directive from Stone's superiors that he should not discuss the company's ES&H problems with federal personnel. And, at least absent some affirmative reason to believe that petitioner's conduct had changed, Stone could also reasonably infer that petitioner had continued to submit false claims after Stone left petitioner's employ. Thus, even though Stone did not claim to have observed the actual submission by petitioner of false claims to the government, his

conclusion that FCA violations had occurred was based on "direct and independent knowledge" that he had acquired during his tenure as a Rockwell employee.

***2. An individual need not personally observe the preparation or submission of specific false claims in order to qualify as an "original source"***

Petitioners do not contend that Stone lacked "direct and independent knowledge" of the information that he provided in his affidavit. Rather, they argue that Stone was not an "original source" because he did not personally witness the preparation or submission of particular false claims. That argument lacks merit.

By its terms, 31 U.S.C. 3730(e)(4)(B) does not require that the relator have direct and independent knowledge of particular fraudulent documents or other details of the fraud. Rather, Section 3730(e)(4)(B) states that an "original source" must have "direct and independent knowledge of the *information* on which the *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). And, as petitioners recognize (Br. 26 n.13), the word "allegations" in Section 3730(e)(4)(B) is properly construed to refer to the averments contained in the relator's complaint.[8] There is consequently no merit to petitioners' contention that Stone was required to demonstrate "direct and independent knowl-

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[8] As petitioners point out (Br. 26 n.13), some courts have construed Section 3730(e)(4)(B)'s reference to "the information on which the allegations are based" to refer to the information that underlies the relevant public disclosures, rather than the information that underlies the relator's complaint. We agree with petitioners (see *ibid.*) that the word "allegations" in Section 3730(e)(4)(B) is properly construed to refer to the averments in the relator's complaint. That does not mean, however, that an original source" must have "direct and independent knowledge" of the information that underlies *every* aspect of his complaint. See pp. 30-39, *infra*.

edge" of particular false claims. Stone did not need to establish personal knowledge of specific misrepresentations because his own "allegations" were not "based" (31 U.S.C. 3730(e)(4)(B)) on information of that character.

Of course, Stone could not have stated a claim under the FCA simply by alleging that petitioner had committed widespread ES&H violations. Stone was required to (and did) allege in addition that petitioner had sought money or property from the United States by misrepresenting that it was in compliance with applicable ES&H requirements. Another relator might have determined that such misrepresentations were made by examining specific documents through which petitioner had requested federal funds. Stone, however, reached his conclusion by a different route. Having learned as a Rockwell employee that petitioner had sought and obtained award bonuses from DOE, and that satisfactory ES&H performance was a prerequisite for such payments, he reasonably inferred that petitioner had claimed to be in compliance with ES&H requirements. Because Stone had "direct and independent knowledge" of all the information on which his own allegations of fraud were based, he was an "original source" within the meaning of Section 3730(e)(4)(B).

***3. Determinations concerning the specificity with which fraud must be pleaded, and the quantum of evidence that a plaintiff must possess in order to allege that fraud has occurred, are governed by provisions of law other than 31 U.S.C. 3730(e)(4)***

Although there are limits on a *qui tam* relator's freedom to base his FCA claims on inferences or speculation, those limits are imposed by provisions of law *other than* 31 U.S.C. 3730(e)(4), and their application does not depend on whether a particular *qui tam* suit is based upon a "public disclosure." As in any federal civil action, Stone was re-

quired to include in his complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy Rule 8(a)(2), a plaintiff must plead facts that demonstrate "a reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)).[9] And, as in any federal civil action, a complaint in a *qui tam* suit constitutes an implicit representation that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3).[10] See *United States ex rel. Detrick* v. *Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018 n.25 (E.D. Va. 1995) (noting in the *qui tam* context that, "[i]f, after a reasonable pre-complaint inquiry, a person still bases the factual allegations of his complaint only on rumor or suspicion, he does not have an adequate Rule 11 basis to make those allegations").

Thus, after Stone submitted his affidavit explaining the bases for his conclusion that petitioner had submitted false claims to the government, petitioner might have argued that the inferences Stone drew from his personal observations were unduly speculative, and that Stone's allega-

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[9] The application of Rule 8(a)(2) to claims under Section 1 of the Sherman Act is currently before the Court in *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126 (to be argued Nov. 27, 2006).

[10] Rule 11 was amended to its current form in 1993. In December 1992, when petitioner moved to dismiss Stone's complaint under 31 U.S.C. 3730(e)(4), Rule 11 provided that an attorney's signature on a complaint or other filing constituted a representation by the signer that the filing was "well grounded in fact." Fed. R. Civ. P. 11 (1988).

tions of fraud therefore lacked a sufficient factual basis to satisfy Rule 11.[11] That challenge would not have required any antecedent showing that Stone's *qui tam* suit was "based upon" a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A). Petitioners have not contended, however, that Stone failed to satisfy the requirements of Rule 11. Nor have petitioners argued that Stone's initial complaint failed to comply with the pleading requirements of Rule 8(a)(2).

Petitioner did move in the district court for dismissal of the FCA claim in Stone's initial *qui tam* complaint on the ground that Stone had failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b). See note 3, *supra*. That motion argued that Stone's allegations failed to satisfy Rule 9(b) because the complaint did not identify "the dates or amounts of the alleged false claims, who (knowing them to be false) made them, who in the Government was thereby misled, or any reference to the documents containing them." Br. in Supp. of Rockwell's Mot. to Dismiss 2 (filed Dec. 28, 1990). The district court

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[11] This is not to suggest that such a challenge would have been *meritorious*. Under the relatively relaxed standard embodied in Rule 11(b)(3), Stone's attestation to facts within his knowledge (*i.e.*, that petitioner had committed frequent ES&H violations yet had requested and received federal award bonuses for which ES&H compliance was a prerequisite) provided "evidentiary support" for Stone's FCA claims, even though greater specificity was required in order to prove those claims at trial. See Fed. R. Civ. P. 11(b) and (c) advisory committee's note (1993) (Amendment) (explaining that the Rule in its current form reflects a "recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation").

denied that motion, see note 3, *supra*, and petitioners have not challenged that ruling.[12]

Thus, Federal Rules of Civil Procedure 8(a)(2), 9(b), and 11 establish pleading and evidentiary-basis requirements that apply to *qui tam* suits generally, whether or not a particular suit is based on publicly disclosed allegations or transactions. Taken together, those Rules protect *qui tam* defendants against the burdens of litigation when a relator's allegations of fraud are inadequately defined or factually unsupported. Federal Rule of Civil Procedure 56, which governs summary judgment motions, provides an additional mechanism for terminating a *qui tam* suit before trial if the relator is unable to amass evidence sufficient to prove the elements of his claim. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-327 (1986); J.A. 74-75 (petitioner's motion to dismiss pursuant to 31 U.S.C. 3730(e)(4) states that petitioner "believes Stone has no facts to support these allegations of false statements and concealments, and has accordingly filed a motion under Fed. R. Civ. P. 56 seeking judgment in its favor"). In short, "[t]o the extent that [a *qui tam*] plaintiff comes forward only with a bare allegation unsupported by proof, the district court has ample tradi-

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[12] In the view of the United States, it is possible for a relator (or the government) in an FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s "particularity" requirement even without identifying specific false claims. See *United States* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (holding that relator's allegations concerning the defendant's general billing practices were sufficient to satisfy Rule 9(b)), cert. denied, No. 06-152 (Nov. 6, 2006). That is particularly so in light of "the flexibility provided by Rule 11(b)(3)," which "allow[s] pleadings based on evidence reasonably anticipated after further investigation or discovery." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000). But see *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-235 (1st Cir.), cert. denied, 543 U.S. 820 (2004).

tional tools with which to dismiss the case." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 655 n.10 (D.C. Cir. 1994) (citing Fed. R. Civ. P. 9(b), 12(b)(6), and 56). Petitioners, however, raise no claims in this Court under any of the Rules that afford that protection.

As the case comes to this Court, it therefore may appropriately be assumed that Stone's original complaint complied with the requirements under the Federal Rules of Civil Procedure that generally serve to protect civil defendants (including defendants in *qui tam* cases) from ill-defined or factually baseless allegations of wrongdoing. And because the allegations in Stone's original complaint were based solely on information that he acquired in his capacity as a Rockwell employee, Stone easily satisfied the statutory criteria for status as an "original source." Under those circumstances, the fact that Stone's original complaint was based in part on publicly-disclosed information did not trigger any heightened-pleading requirement, and it did not compel Stone to demonstrate more specific evidence of petitioner's fraudulent conduct than the Federal Rules of Civil Procedure would otherwise have mandated.[13]

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[13] In arguing that Stone's *qui tam* suit was precluded by 31 U.S.C. 3730(e)(4)'s "public disclosure" bar, petitioners do not identify any pre-filing public disclosure of allegations that petitioner had submitted false claims for payment to the federal government, let alone any public disclosure that identified specific false claims. Petitioners thus do not dispute that Stone based his allegations concerning petitioner's billing practices on inferences drawn from his own observations as a Rockwell employee. Therefore, in this case, for the reasons stated above, any argument that those observations provided an insufficient basis for inferring fraud would raise an issue under Federal Rules of Civil Procedure 9(b), 11(b)(3), and 56, not under Section 3730(e)(4)(B).

***4. A relator may qualify as an "original source" even if his information concerning the nature of the defendant's representations to the government is derived from publicly available materials***

Petitioners raise a further argument that, while not directly implicated by the circumstances of this case, would substantially undermine the purposes of the "original source" exception to the "public disclosure" bar to *qui tam* suits. In a typical FCA case, the government or a private relator alleges that (a) the defendant requested government funds or property by making certain (explicit or implicit) representations concerning its entitlement to payment, and (b) the actual state of affairs was such that those representations were false. See, *e.g.*, *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir.) ("X (misrepresented state of facts) + Y (true state of facts) = Z (fraud)"), cert. denied, 522 U.S. 865 (1997). Consistent with that usual pattern, Stone alleged in his original complaint that petitioner had sought and obtained government funds by claiming to be in compliance with applicable ES&H requirements, and that petitioner had in fact engaged in widespread ES&H violations. Petitioners contend (*e.g.*, Br. 26-27) that, to qualify as an "original source," Stone was required to demonstrate "direct and independent knowledge" of information concerning *both* the nature of petitioner's representations to the government and petitioner's actual non-compliance with the ES&H laws.

Even if 31 U.S.C. 3730(e)(4)(B) imposed such a requirement, Stone would have satisfied it here. As we explain above, both (a) Stone's allegation that petitioner had repeatedly violated the ES&H laws and (b) his allegation that petitioner had obtained federal funds by claiming to be in compliance with ES&H requirements were based on infor-

mation that Stone had acquired in his capacity as a Rockwell employee. Although the latter allegation was premised in part on logical inferences rather than on inspection of specific requests for payment, Stone obtained the "information" on which those inferences and the resulting allegation were "based" directly and independently of any public disclosure.

In other quite common fact patterns, however, acceptance of petitioners' theory would disqualify potential relators whose suits would clearly further Congress's purposes in allowing certain *qui tam* suits to go forward even when a "public disclosure" has alerted the government to the possible existence of fraud. A relator who possesses firsthand knowledge of substantial information about the core of the defendant's fraud—the facts on the ground concerning the defendant's actual course of conduct that show the defendant's claims to be knowingly false—may provide the key information that makes clear that the defendant's conduct is wrongful, and may thereby make valuable contributions to the government's anti-fraud efforts, even if his information concerning the contents of the certification requirements or representations to the government (which, standing alone, would be innocuous) is acquired from publicly-available sources. Petitioners' interpretation of Section 3730(e)(4)(B), which would deny "original source" status to such a relator, is in no way compelled by the statutory text, and it would largely eviscerate the "original source" provision.

a. The statutory definition of the term "original source" requires "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B). When a relator's knowledge of different categories of relevant information has been acquired through different means, the text of Section 3730(e)(4)(B) provides

no formula for determining *how much* of the relevant information the relator must perceive "direct[ly]" and "independent[ly]" in order to qualify as an "original source." Absent a precise textual standard for resolving that question, Section 3730(e)(4)(B) should be construed so as to further the purposes that led Congress to allow certain *qui tam* suits to go forward even after a "public disclosure" has occurred. Cf. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Section 3730(e)(4) serves two basic purposes that must be given effect in its proper construction. First, as petitioners recognize (Br. 23), 31 U.S.C. 3730(e)(4) serves in large part to distinguish relators who may provide meaningful assistance in putting the government on the trail of fraud from those who simply exploit pre-existing knowledge of possible wrongdoing. See, *e.g.*, *Springfield Terminal Ry.*, 14 F.3d at 651 (explaining that the FCA's *qui tam* provisions "must be analyzed in the context of [Congress's] twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own"); *id.* at 649-651 (describing historical development of the "public disclosure" bar and its role in curbing "parasitic" *qui tam* suits). Section 3730(e)(4) thus balances the congressional objectives of "promot[ing] private citizen involvement in exposing fraud against the government" and "prevent[ing] parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." *United States ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), cert. denied, 515 U.S. 1142 (1995).

Second, even apart from the potential for certain *qui tam* suits to alert the government to claims that it would otherwise lack the information to pursue, the "original source" exception to Section 3730(e)(4)(A) reflects Congress's judgment that it is sometimes inequitable or unwise to treat an antecedent public disclosure as a ground for denying a relator a share of the government's recovery. That would be most obviously true, for example, where the relator's own investigative or whistle-blowing activities had *caused* the relevant public disclosure to occur. See *Springfield Terminal Ry.*, 14 F.3d at 650-651 (explaining that the "original source" exception to the "public disclosure" bar was intended in part to supersede the holding in *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984), that a *qui tam* suit based on information in the government's possession was barred even though the relator had furnished the information to the government). In other circumstances, a relator's extensive firsthand knowledge of relevant facts might reflect the sort of diligent investigation that Congress wished to encourage and reward. If *qui tam* suits based upon publicly-disclosed allegations or transactions were categorically precluded, potential relators might hesitate to undertake such investigations because fortuitous pre-filing publicity could render their efforts nugatory.[14]

b. Both of the purposes of Section 3730(e)(4) discussed above support the conclusion that a relator may qualify as an "original source" so long as he has knowledge of the true

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[14] In the situations described in the text, the government may be fully capable of pursuing the relevant allegations of fraud *once the public disclosures have occurred*. Congress reasonably concluded, however, that allowing *qui tam* suits under those circumstances would further the government's long-term anti-fraud efforts by creating appropriate incentives for potential future relators to share information with the government in the first place.

state of affairs that renders the defendant's representations to the government knowingly false. See *Springfield Terminal Ry.*, 14 F.3d at 653-657. A relator who has firsthand knowledge of such information may provide substantial assistance to the government's anti-fraud efforts, or may otherwise be deserving of a share of the government's recovery, even if the relator learns of the representations themselves only through publicly-available sources. This makes particular sense because the representations standing alone are almost invariably innocuous and will in any event be shared with the government by the false claims defendant itself. It is the contradictory true state of affairs that will be critical to establishing the fraudulent nature of the representations, and the defendant will often take affirmative steps to conceal that information. For that reason, "[i]f the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand." *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir.), cert. denied, 537 U.S. 944 (2002); *Springfield Terminal Ry.*, 14 F.3d at 656-657.

Of course, even if a *qui tam* relator has "direct and independent" knowledge of pervasive illegalities committed by the defendant, he must allege that the defendant has sought to defraud the federal government, and he must comply with the relevant provisions of the Federal Rules of Civil Procedure. Thus, the relator must have an evidentiary basis for alleging fraud on the government that satisfies Rule 11(b)(3); he must plead the fraud with the "particularity" required by Rule 9(b); and, after suitable discovery, he must produce evidence that is sufficient to withstand a motion for summary judgment under Rule 56. See pp. 25-29, *supra*. Those Rules would bar or cut off *qui tam* suits brought by relators who observe unlawful conduct and sim-

ply speculate that the perpetrator misrepresented the true state of affairs in seeking federal money or property. But so long as the relator's allegations of fraud satisfy the requirements of those Rules, his suit may go forward, and he may qualify as an "original source" even if his information concerning the nature and content of the defendant's specific claims is drawn from publicly-available materials.

Indeed, because the FCA addresses efforts to defraud the United States, federal officials will ordinarily be familiar with the claims submitted by the defendant. Any independent knowledge that the relator may possess about what is contained within the four corners of the documents constituting the claims will therefore typically be of less practical benefit to the government than information concerning the facts that show those claims to be knowingly false. By the same token, it may be that only a few employees within a corporation are immediately involved in preparation of documents that are submitted to the government, and that no other employees will actually observe the claims themselves first hand. To be sure, an enterprising person involved in the submission of claims might get wind of information that suggests that the claims include misrepresentations and serve as a proper relator. But in reality, many government contractors are large corporations whose billing functions may be far removed from those with knowledge of the core of the fraud. Accordingly, if "direct and independent knowledge" of the contents of a defendant's claims themselves were a prerequisite to "original source" status under Section 3730(e)(4)(B), a substantial number of potential relators would be disqualified on a ground essentially unrelated to their capacity to assist the government in establishing the underlying fraud. See *Springfield Terminal Ry.*, 14 F.3d at 654 (explaining that, when information concerning the contents of the defen-

dant's representations "by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistle-blower's suit is banned").

c. The overall structure of 31 U.S.C. 3730(e)(4) reinforces that conclusion. Under Section 3730(e)(4)(A), a relator must establish his status as an "original source" whenever a *qui tam* suit is "based upon" specific categories of "public disclosure[s]." In holding that Stone's *qui tam* suit was "based upon" a covered "public disclosure," the district court relied (see Pet. App. 59a-60a) on the Tenth Circuit's prior decision in *United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.2d 548 (1992), cert. denied, 507 U.S. 951 (1993)), in which the court of appeals recognized that "the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." 971 F.2d at 552. Under that "quick trigger" approach, the "'original source' requirement applies even if a *qui tam* plaintiff's allegations are based only partly upon publicly disclosed allegations or transactions." Pet. App. 59a-60a. And under the construction of Section 3730(e)(4)(A) adopted by the Tenth Circuit and most other courts of appeals, with which the government agrees, a *qui tam* suit may qualify as "based upon" a covered "public disclosure" even if the relator does not actually derive his information from publicly available materials.[15]

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[15] See, *e.g.*, *Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1043-1044 (10th Cir. 2004) (*qui tam* complaint was "based upon" a prior "public disclosure" because relators' allegations were "substantially similar" to the allegations in a prior civil complaint filed by a different litigant), cert. denied, 125 S. Ct. 2957 (2005); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) (Section 3730(e)(4)(A) applies when the relator's allegations "are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit * * *, regardless of where the relator obtained his information."); *United*

In light of Section 3730(e)(4)(A)'s expansive scope, that provision (and the accompanying requirement that the relator demonstrate his status as an "original source") will encompass many *qui tam* suits brought by relators who can significantly assist the government's efforts to detect and redress fraud. An unduly narrow construction of the term "original source" in Section 3730(e)(4)(B), when combined with a relatively quick trigger for finding a suit to be "based upon" publicly disclosed information, would thus subvert Congress's effort to strike an appropriate balance between encouraging relators who have meaningful information to contribute, or who are otherwise deserving of a share of the government's recovery, and discouraging opportunistic suits. And there is no logical or practical justification for petitioners' view of Section 3730(e)(4), under which subparagraph (A) encompasses *qui tam* suits based even in part on publicly-disclosed information, while subparagraph (B) requires personal familiarity with all aspects of the fraud.[16]

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*States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 385-389 (3d Cir. 1999) (same), cert. denied, 529 U.S. 1018 (2000); *United States ex rel. Biddle* v. *Board of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 536-540 (9th Cir. 1998) (same), cert. denied, 526 U.S. 1066 (1999); *Findley*, 105 F.3d at 682-685 (same); but see, e.g., *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1347-1349 (4th Cir.) (*qui tam* complaint is "based upon" a "public disclosure" only if the relator actually derives his claims from that public disclosure), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Feingold* v. *AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (same).

[16] Even if subparagraph (A) is given the relatively broad interpretation described in the text, the relator's allegations must be based at least in *substantial* part on publicly disclosed information, such that disclosure of relatively minor aspects of the overall claim would not trigger the "public disclosure" bar and the resulting requirement that the relator establish his status as an "original source." For similar reasons, release into the public domain of information concerning the

d. Petitioners contend that, in order to qualify as an "original source," a relator must not only have "direct and independent knowledge" of all elements of the fraud (*i.e.*, both the nature of the defendant's representations to the government and the facts showing those representations to be false), but must in addition possess such knowledge *at the level of specificity needed to establish liability at trial* (*e.g.*, through the identification of particular false claims). See, *e.g.*, Pet. Br. 41. That view is inconsistent with the basic principles governing pleading under the Federal Rules of Civil Procedure, which "allow pleading based on evidence reasonably anticipated after further investigation or discovery." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000); see pp. 25-27 & note 11, *supra*. Accepting that view also would largely eviscerate the "original source" provision. In a company of any meaningful size, no single employee is likely to possess firsthand knowledge of both the details of the defendant's claims and the circumstances showing the claims to be false, at least not with sufficient specificity to support a jury verdict unaided by discovery.

In *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), the defendant argued that it lacked the scienter required for FCA liability because no single employee of the company knew of both the company's certifications to the government and of the facts showing those certifications to be false. *Id.* at 918. The court of appeals "decline[d] to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement." *Id.* at

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existence of a contract with the government or a claim submitted to it, which in itself or by its nature is entirely lawful, unaccompanied by any suggestion of underlying fraud or illegality, may not constitute a "public disclosure of allegations or transactions" within the meaning of Section 3730(e)(4)(A). Cf. *Springfield Terminal Ry.*, 14 F.3d at 653-655.

919. The court explained that, if that view were accepted, "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability." *Ibid.* Petitioners' proposed construction of 31 U.S.C. 3730(e)(4)(B) would create an analogous incentive for federal contractors to reduce their potential exposure to *qui tam* suits by segregating workplace functions to assure that no employee could qualify as an "original source."

### B. Any Clarification Or Refinement Of The FCA Allegations That May Have Occurred After The Government Intervened In This Case Is Irrelevant To The "Original Source" Inquiry

In its December 1992 motion to dismiss Stone's original *qui tam* complaint (see J.A. 73-93), petitioner did not contend that Stone lacked "direct and independent knowledge" of the ES&H violations that petitioner was alleged to have committed. See Pet. App. 61a. In this Court, however, petitioners argue (*e.g.*, Br. 17-18, 27-28) that Stone cannot qualify as an "original source" because he lacked personal knowledge of the fact that petitioner had used inadequate cement in its manufacture of pondcrete. Petitioners contend (Br. 28 n.16) that "where, as here, the relator fundamentally changes his allegations in a way that potentially impacts his original source status, then the court must assure itself that it retains jurisdiction over the action as amended." That argument is mistaken, at least in the circumstances of this case.

### *1. The government's intervention in this case provided an independent basis for the district court to adjudicate the FCA claim filed jointly by the United States and Stone*

a. For purposes of determining whether the district court had jurisdiction in this case, the Court need not definitively decide the circumstances in which a new "public disclosure"/"original source" inquiry would be necessary if the government declines to intervene in a *qui tam* action, the relator litigates the suit to its conclusion, and the theory of liability changes substantially along the way. Presumably, there would be some requirement that the ultimate theory have some relationship to the original theory that satisfied the "original source" test. It is also unnecessary to determine what rule would apply if the government intervenes in a pending *qui tam* action and the relator thereafter seeks to add new claims to (or amend existing claims in) his own complaint. Whatever the correct approach might be in those situations, no new "public disclosure"/"original source" inquiry was necessary for jurisdictional purposes in this case because the *only* FCA claim presented to the jury was asserted by the United States as well as by Stone.

Under the FCA's "public disclosure" provision, a court lacks jurisdiction over claims based on publicly disclosed information "unless the action is brought by the Attorney General *or* the person bringing the action is an original source of the action." 31 U.S.C. 3730(e)(4)(A) (emphasis added). In the instant case, the government was granted leave to intervene in November 1996, see J.A. 382-388, and the United States and Stone filed an amended complaint the following month, see J.A. 395-426. The *only* FCA claim that was ultimately presented to the jury was the claim set forth in Count 1 of the amended complaint, which was asserted *jointly* by the government and Stone. See J.A. 416-

417.[17] And to the extent that the FCA claim asserted in Count 1 of the amended complaint was clarified or refined during the subsequent course of the litigation, that was done "at the government's behest." J.A. 570; see pp. 11-12, *supra*; pp. 43-44, *infra*. Because the claim on which petitioner was held liable was "brought by the Attorney General," the district court had jurisdiction of that claim under 31 U.S.C. 3730(e)(4)(A), and it therefore was unnecessary, in order to resolve that jurisdictional question, for the court to determine whether Stone was an "original source" of the information on which Count 1 was based.

b. This does not mean that the government's intervention mooted any *pre-existing* defects in Stone's initial *qui tam* complaint. Petitioner argued in the district court in December 1992, see J.A. 73-93, and has consistently maintained throughout this litigation, that Stone's initial complaint was subject to dismissal because it was based in part on publicly disclosed information and Stone lacked "direct and independent knowledge" of any specific false claim. If this Court agrees with petitioners' contention and concludes that Stone's *qui tam* complaint was subject to dismissal *ab initio*, then Stone was never a proper relator, and he was not entitled to participate as a party to the suit after the government's intervention, even though the government's intervention and presentation of Count 1 were sufficient to ensure that the district court had jurisdiction over the suit.[18] But so long as Stone was an "original source" of

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[17] Although the amended complaint did contain one FCA claim that was asserted solely by Stone (see J.A. 418-424), that claim was severed from the rest of the suit (see note 5, *supra*) and is not at issue here.

[18] After the government has intervened in a *qui tam* suit, the government as well as the defendant remains free to contend that the relator's initial complaint was barred by 31 U.S.C. 3730(e)(4), and that the relator therefore should not share in any monetary recovery. As

the information on which the allegations in his *qui tam* complaint were based (see pp. 21-39, *supra*), any clarification or refinement of those allegations that Count 1 of the amended complaint may have accomplished (or that may have occurred at trial) did not necessitate a new "original source" inquiry.

***2. Petitioners' construction of 31 U.S.C. 3730(e)(4)(B) would hinder enforcement of the FCA by discouraging cooperation between the government and private relators***

The FCA provides that, "[i]f the Government proceeds with an action brought by" a *qui tam* relator, and the suit produces a monetary recovery, the relator shall "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d)(1). Under Section 3730(d)(1), a relator's entitlement to a share of the government's recovery is determined on a claim-by-claim basis. When the government intervenes in a pending *qui tam* action, it "shall have the primary responsibility for prosecuting" the claims brought by the relator, see 31 U.S.C. 3730(c)(1), but it may assert additional claims as well, and the relator would not be entitled

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the United States explained in opposing petitioners' request that Stone be excluded from the judgment in this case, "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests, and the government itself sometimes raises this issue when the government concludes that a relator fails to meet the requirements in 31 U.S.C. § 3730(e)(4)." J.A. 571. When the government seeks to pursue allegations of fraud that are encompassed within the general parameters of a prior *qui tam* complaint, the government may also contend that the relator has failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b) (see pp. 27-28, *supra*) and therefore is not entitled to a share of any proceeds of the suit.

to any portion of the recovery that such new claims might produce.

If the government had regarded the pondcrete claims that ultimately prevailed at trial as "new" claims not encompassed by Stone's original complaint, it could have asserted that Stone was not entitled to any portion of the proceeds of the action. And if Stone had contested that position, the district court would have resolved the dispute. A controversy of that nature could arise even in a *qui tam* action that was not "based upon" any prior "public disclosure," and its resolution would not depend on whether the relator qualified as an "original source" of information supporting the purportedly "new" allegations.

In this case, however, the government did not urge the district court to treat its claims concerning the inadequate cement content of petitioner's pondcrete as distinct from the claims asserted in Stone's initial *qui tam* complaint. To the contrary, the government *opposed* petitioners' contention that judgment should be entered only in favor of the United States and not in favor of Stone. See J.A. 568-572. In that regard, the government explained that its conduct of the litigation had been "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys"; that "[t]he allegations actually tried clearly came within the gravamen of Mr. Stone's complaint"; and that "the narrowing that occurred in this case, done at the government's behest for tactical litigation reasons, did not transform the case into a 'different case,' it merely made it a more finely-honed case." J.A. 570-571.

Petitioners' view of 31 U.S.C. 3730(e)(4), under which refinements in the theory of liability after the government has intervened may necessitate a new "public disclosure"/"original source" inquiry, would hinder the government's enforcement of the FCA by creating artificial disin-

centives to cooperation between the government and private relators. As the government explained in opposing petitioners' request that Stone be excluded from the judgment, "the narrowing that occurred in this case" after the government had intervened was "done at the government's behest for tactical litigation reasons." J.A. 570; see 31 U.S.C. 3730(c)(1) (explaining that, when the United States intervenes in a pending *qui tam* suit, the government "shall have the primary responsibility for prosecuting the action"). Future relators would be discouraged from acquiescing in such refinements if their potential entitlement to a share of the proceeds depended on proof that they possessed "direct and independent knowledge" supporting the precise theory of liability on which the government preferred to focus. Absent any dispute between the government and the relator as to whether the relator's initial allegations encompassed the theory ultimately presented at trial, the defendant should not be permitted to use Section 3730(e)(4) to drive a wedge between the co-plaintiffs. Cf. J.A. 577 (district court observes that, absent any apparent disagreement between Stone and the government regarding the proper division of the money judgment in this case, the court was "not here to generate disputes that don't exist").[19]

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[19] The most direct and significant consequence of the district court's determination that Stone was an "original source" is that Stone is entitled to a share of the money judgment. As the district court recognized, "the division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone" and does not, in and of itself, affect petitioners' interests. J.A. 577. Petitioners contend, however, that "[r]eversal of the judgment [in Stone's favor] would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party." Pet. Br. 9 n.6; see

### C. Before Filing His Initial Complaint, Stone Voluntarily Provided The Government With The Information On Which His Allegations Were Based

In order to qualify as an "original source," Stone was required to demonstrate both that he had "direct and independent knowledge of the information on which [his] allegations [were] based," and that he had "voluntarily provided the information to the Government before filing an action under [the FCA] which is based on the information." 31 U.S.C. 3730(e)(4)(B). Petitioners contend (Br. 43-49) that Stone failed to satisfy the latter requirement because he provided the government with no significant information

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31 U.S.C. 3730(d)(1) (relator who receives a share of the recovery after the government intervenes "shall * * * receive * * * reasonable attorneys' fees and costs").

The district court has not yet ruled on Stone's request for attorneys' fees. See J.A. 578. Quite apart from any "public disclosure" issue, petitioners remain free to argue that Stone should receive a reduced fee award, or no attorneys' fees at all, on the ground that he played an insubstantial role in the ultimate success of the litigation. Cf. *Farrar* v. *Hobby*, 506 U.S. 103, 114-116 (1992) (where civil rights plaintiff prevails on the merits but is awarded only nominal damages, the "reasonable" attorneys' fee ordinarily is no fee at all). Of course, the government's prior representation that its conduct of the suit was "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys," J.A. 570, and its failure to contest Stone's entitlement to a share of the proceeds, make it unlikely that such an argument would succeed. But once again, those same issues can arise in disputes over a relator's attorneys' fees in *any qui tam* case, without regard to whether a "public disclosure"/"original source" issue arises.

concerning potential defects in petitioners' pondcrete.[20] That argument is wrong for two reasons.

a. Petitioners do not contend that Stone possessed significant information about petitioner's pondcrete that he *failed* to disclose to the government in a timely fashion. Rather, the apparent thrust of petitioners' argument is that Stone's pondcrete-related disclosures were inadequate in some absolute sense, even if they reflected substantially all the relevant information that Stone possessed. Under Section 3730(e)(4)(B), however, the "information" that a relator must have disclosed to the government is the "information on which the allegations [in the *qui tam* complaint] are based." So long as the relator has voluntarily told the government what he knows, he satisfies Section 3730(e)(4)(B)'s prior-disclosure requirement. To the extent petitioners contend that the information Stone presented to the government was inadequate to support the allegations of his complaint, Section 3730(e)(4)(B) in general and the requirement that information be presented to the government in particular is irrelevant to that question, which instead implicates other provisions of law. See pp. 25-29, *supra*.

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[20] Two courts of appeals have held that an "original source" must voluntarily disclose his information to the government not only before the filing of his *qui tam* complaint, but also before any covered "public disclosure" has occurred. See *Findley*, 105 F.3d at 690; *United States ex rel. McKenzie* v. *BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998). The question whether those holdings are correct is not presented by this case. Petitioners do not contend that Stone failed to comply with any such requirement, and it does not appear that Stone made significant disclosures to the government between the time of the relevant public disclosures (which occurred in early June 1989) and the filing of his *qui tam* complaint the following month. See Pet. Br. 43 (stating that "[t]he only disclosures germane to this inquiry are the ones that Stone made to the FBI in 1987-88").

b. Even if Section 3730(e)(4)(B) required prior disclosure to the government of a quantum of information that is substantial in an absolute sense, Stone satisfied that requirement here. Stone attested that he first discussed petitioner's ES&H problems with an FBI Special Agent in 1986, that he had meetings and telephone contact with federal officials on several later occasions, and that he ultimately provided the FBI with more than 2300 pages of documents. J.A. 180-181; see, *e.g.*, J.A. 266 (FBI agent's report states that Stone "voluntarily provided over 1100 copies of documents" in March 1988). Petitioners do not question the accuracy of those assertions.

Petitioner's December 1992 motion to dismiss Stone's initial *qui tam* complaint (J.A. 73-93) did not contest the adequacy of Stone's prior disclosures to the government, but argued only that Stone lacked "direct and independent knowledge" of specific false claims. Petitioners' current contention that Stone must identify substantial *pondcrete-related* disclosures is clearly premised on their view that the district court was required to conduct a new "original source" analysis with reference to the specific theory of liability on which the government and Stone prevailed at trial. That argument is mistaken for the reasons stated at pp. 39-44, *supra*.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2006

**18**

No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTION PRESENTED

Whether the Court should affirm the decision of the Court of Appeals affirming the district court's findings in this 17 year-old case that the *qui tam* relator is an "original source" under the plain language of the False Claims Act, 31 U.S.C. § 3730(e)(4).

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 14

ARGUMENT ..... 16

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AFFIRMANCE ..... 16

A. The Original Source Provision and the Plain Meaning of "Direct and Independent Knowledge" ..... 17

B. The Statute Clearly Provides That the Direct and Independent Knowledge an Original Source Must Have Is "Information on Which the Allegations Are Based" ..... 21

C. Rockwell's Position as to What "Information" a Relator Must Possess To Be an Original Source Is Contrary to the Plain Language of the Statute ..... 22

D. Rockwell's Position as to the Significance or Amount of "Information" a Relator Must Possess To Be an Original Source Also Finds No Support in the Statute ..... 30

E. The History of the Statute Supports Mr. Stone's Plain Language Reading ..... 35

II. THE COURTS BELOW CORRECTLY FOUND THAT MR. STONE IS AN ORIGINAL SOURCE ..... 38

A. Mr. Stone Had Direct and Independent Knowledge of the Information on Which His Allegations Were Based ..... 38

B. Mr. Stone Provided the Information on Which His Allegations Were Based to the Government Before Filing Suit ..... 47

C. Should the Court Adopt a Different Standard Than Used By the Courts Below, It Should Remand ..... 50

CONCLUSION ..... 50

## TABLE OF AUTHORITIES

### CASES

**Page(s)**

*Anderson* v. *Bessemer City*,
470 U.S. 564 (1985)..... 38, 50

*Bell* v. *Hood*,
327 U.S. 678 (1946)..... 29

*Boelens* v. *Redman Homes, Inc.*,
759 F.2d 504 (5th Cir. 1985)..... 26

*Cooper* v. *Blue Cross & Blue Shield of Florida, Inc.*,
19 F.3d 562 (11th Cir. 1994)..... 32, 46

*Dole Food Co.* v. *Patrickson*,
538 U.S. 468 (2003)..... 28

*Easley* v. *Cromartie*,
532 U.S. 234 (2001)..... 38, 50

*Exxon Co., U.S.A.* v. *Sofec, Inc.*,
517 U.S. 830 (1996)..... 46

*FCC* v. *Pacifica Foundation*,
438 U.S. 726 (1978)..... 18

*Federal Recovery Services, Inc.* v. *United States*,
72 F.3d 447 (5th Cir. 1995)..... 27

*Fogerty* v. *Fantasy, Inc.*,
510 U.S. 517 (1994)..... 31

*Freeport-McMoRan, Inc.* v. *K N Energy, Inc.*,
498 U.S. 426 (1991)..... 28

*Garcia* v. *United States*,
469 U.S. 70 (1984) ..... 18

*Georgia* v. *Ashcroft*,
539 U.S. 461 (2003) ..... 50

*Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*,
336 U.S. 271 (1949) ..... 46

*Grupo Dataflux* v. *Atlas Global Group, L.P.*,
541 U.S. 567 (2004) ..... 28

*Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*,
484 U.S. 49 (1987) ..... 28

*Hartford Underwriters Insurance Co.* v. *Union Planters Bank, N.A.*,
530 U.S. 1 (2000) ..... 31

*Hughes Aircraft Co.* v. *United States ex rel. Schumer*,
520 U.S. 939 (1997) ..... 17, 37

*Keene Corp.* v. *United States*,
508 U.S. 200 (1993) ..... 28

*Kennard* v. *Comstock Resources, Inc.*,
363 F.3d 1039 (10th Cir. 2004) ..... 20, 23

*Klepper* v. *First American Bank*,
916 F.2d 337 (6th Cir. 1990) ..... 28

*Landreth Timber Co.* v. *Landreth*,
471 U.S. 681 (1985) ..... 22

*Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*,
523 U.S. 26 (1998) ..... 35

*Midwest Underground Storage, Inc.* v. *Porter*,
717 F.2d 493 (10th Cir. 1983) ..... 45

*Minnesota Association of Nurse Anesthetists* v. *Allina Health System Corp.*,
276 F.3d 1032 (8th Cir. 2002) ..... 22, 45

*Mullan* v. *Torrance*,
22 U.S. (9 Wheat.) 537 (1824) ..... 28

*Reiter* v. *Sonotone Corp.*,
442 U.S. 330 (1979) ..... 18

*Rufo* v. *Inmates of Suffolk County Jail*,
502 U.S. 367 (1992) ..... 50

*Russello* v. *United States*,
464 U.S. 16 (1983) ..... 31

*Saudi Arabia* v. *Nelson*,
507 U.S. 349 (1993) ..... 24

*Servants of the Paraclete* v. *Does*,
204 F.3d 1005 (10th Cir. 2000) ..... 27

*Smith* v. *United States*,
508 U.S. 223 (1993) ..... 35

*United States Association of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*,
484 U.S. 365 (1988) ..... 35

*United States* v. *Bestfoods*,
524 U.S. 51 (1998) ..... 50

*United States* v. *Joy*,
192 F.3d 761 (7th Cir. 1999).....23

*United States* v. *Rockwell International Corp.*,
124 F.3d 1194 (10th Cir. 1997),
*cert. denied*, 523 U.S. 1093 (1998).....9

*United States ex rel. Aflatooni* v. *Kitsap Physicians Services*,
163 F.3d 516 (9th Cir. 1999).....45

*United States ex rel. Campbell* v. *Redding Medical Center*,
421 F.3d 817 (9th Cir. 2005).....32

*United States ex rel. Dick* v. *Long Island Lighting Co.*,
912 F.2d 13 (2d Cir. 1990).....49

*United States ex rel. Fallon* v. *Accudyne Corp.*,
97 F.3d 937 (7th Cir. 1996).....27

*United States ex rel. Findley* v. *FPC-Boron Employees' Club*,
105 F.3d 675 (D.C. Cir. 1997) .....49

*United States ex rel. Fine* v. *Chevron, U.S.A., Inc.*,
72 F.3d 740 (9th Cir. 1995).....47

*United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*,
190 F.3d 1156 (10th Cir. 1999)..... 22, 26, 29

*United States ex rel. Laird* v. *Lockheed Martin Engineering & Science Services Co.*,
336 F.3d 346 (5th Cir. 2003).....19

*United States ex rel. Marcus* v. *Hess*,
317 U.S. 537 (1943)..... *passim*

*United States ex rel. McKenzie* v. *Bell South Telecommunications, Inc.*,
123 F.3d 935 (6th Cir. 1997)..... 49

*United States ex rel. Merena* v. *SmithKline Beecham Corp.*,
205 F.3d 97 (3d Cir. 2000)..... 27, 33

*United States ex rel. Mistick PBT* v. *Housing Authority of Pittsburgh*,
186 F.3d 376 (3d. Cir. 1999)..... *passim*

*United States ex rel. Paranich* v. *Sorgnard*,
396 F.3d 326 (3d Cir. 2005)..... 47

*United States ex rel. S. Prawer and Co.* v. *Fleet Bank of Maine*,
24 F.3d 320 (1st Cir. 1994)..... 17, 36

*United States ex rel. Springfield Terminal Railway Co.* v. *Quinn*,
14 F.3d 645 (D.C. Cir. 1994)..... *passim*

*United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Insurance Co.*,
944 F.2d 1149 (3d Cir. 1991)..... 20

*United States ex rel. Wisconsin* v. *Dean*,
729 F.2d 1100 (7th Cir. 1984)..... 25, 26

*Wang* v. *FMC Corp.*,
975 F.2d 1412 (9th Cir. 1992)..... 21, 42, 49

*Wellness Community-National* v. *Wellness House*,
70 F.3d 46 (7th Cir. 1995)..... 26

## STATUTES

12 U.S.C. § 4805 ..... 31

31 U.S.C. §§ 3729-33 ..... 1

31 U.S.C. § 3730 ..... *passim*

31 U.S.C. § 3730(b)(4) (superseded). ..... 25

31 U.S.C. § 3731(c) ..... 31, 36

31 U.S.C. § 6104 ..... 31

42 U.S.C. § 1320a-7a ..... 31

Pub. L. No. 78-213, 57 Stat. 608, 609 (1943) ..... 35

## LEGISLATIVE MATERIALS

132 Cong. Rec. 20536 (Aug. 11, 1986) ..... 34

132 Cong. Rec. 28580 (Oct. 3, 1986) ..... 34

132 Cong. Rec. 29321-22 (Oct. 7, 1986) ..... 34, 36, 37

S. Rep. No. 345, 99th Cong., 2d Sess. (1986),
*reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 36-37

## OTHER AUTHORITY

Black's Law Dictionary (8th ed. 2004) ..... 23

Fed. R. Civ. P. 8 ..... 32

Fed. R. Civ. P. 9(b) ..... 32

Fed. R. Civ. P. 11 ..... 32

Fed. R. Civ. P. 12 ..... 32

Press Release, U.S. Dept. of Justice (Nov. 7, 2005) ..... 37

## BRIEF FOR RESPONDENT JAMES S. STONE

Respondent James S. Stone respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Tenth Circuit.

## STATEMENT OF THE CASE

Respondent James S. Stone, an 81-year-old retired Rockwell engineer, commenced this action in July 1989 under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"), alleging that Rockwell had made false statements to the Government in connection with its environmental, safety and health ("ES&H") activities at the Rocky Flats nuclear weapons facility outside Denver, Colorado ("Rocky Flats" or "the Plant"). Pet. App. 4-5a.[1] Since filing suit over 17 years ago, Mr. Stone has proven his status as a proper *qui tam* relator time and time again in the courts below, the United States agrees that Mr. Stone is an original source, and in 1999 the United States and Mr. Stone jointly tried this case to a jury, which found that Rockwell had violated the FCA as Mr. Stone had alleged for years. Mr. Stone is an original source.

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[1] Citations to the parties' Joint Appendix are denoted as "JA". Citations to the appendix Rockwell submitted with its certiorari petition are denoted as "Pet. App.". Citations to Rockwell's Appendix before the Tenth Circuit are denoted as "CA App." and references to the trial transcripts in Volumes VII through IX therein are denoted as "Tr.". Citations to Mr. Stone's Supplemental Appendix before the Tenth Circuit are denoted as "SA".

*Mr. Stone Is a Paradigmatic Whistleblower.* Beginning in 1986, long before any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily approached the Government. In a series of meetings with Federal Bureau of Investigation ("FBI") and Environmental Protection Agency ("EPA") agents and an Assistant United States Attorney, Mr. Stone provided his direct and independent knowledge of Rockwell's environmental violations and fraud at the Plant, where he had worked for nearly six years. JA 170, 180-82, 250-67, 599-600, 615-21; CA App. 729-30. The ensuing criminal investigation confirmed Mr. Stone's allegation that Rockwell was violating environmental laws on a massive scale, and a jury subsequently confirmed Mr. Stone's allegation that Rockwell also had committed fraud.

Mr. Stone substantially contributed to the criminal prosecution of Rockwell and indisputably spearheaded this FCA action. In July 1989, after his discussions with the Government had concluded, and shortly after the FBI raided Rocky Flats, Mr. Stone initiated this FCA action. JA 38. He litigated the case alone, on the Government's and his own behalf, until the Government intervened in 1996. *Id.* 382-88. Because of the joint efforts of Mr. Stone and the Government, in 1999, a Denver jury found Rockwell liable under the FCA for $4,172,327.40 (trebled). Pet. App. 10a, 68a.

*Mr. Stone Learned of Rockwell's Fraud Through His Employment at Rocky Flats.* With 30 years of engineering experience and several patented inventions, Mr. Stone was employed by Rockwell at Rocky Flats from November 1980 through March 1986. Pet. App. 3a, 17a; JA 170. Given his broad and lengthy experience, Mr. Stone's job for Rockwell consisted of plant-wide "troubleshooting" to identify and devise solutions to problems, including those arising in Rockwell's ES&H operations. Pet. App. 17-18a; JA 170. Projects to which Mr. Stone was assigned at Rocky Flats included waste treatment through a cementation process used to remove and solidify pond sludge and salt wastes to produce

"pondcrete" and "saltcrete," sewage treatment plant operations, the spray irrigation wastewater disposal system, and plutonium processing and beryllium machining operations. Pet. App. 18a; JA 171-79. While working on these projects, Mr. Stone observed serious ES&H problems in each of these areas. Pet. App. 18a; JA 174-76, 228, 289-90 (pondcrete/saltcrete); *id.* 171-72 (sewage treatment plant); *id.* 172-74, 224-25 (spray irrigation); *id.* 176-78 (plutonium); *id.* 178-79 (beryllium); *id.* 181-82 (observations made first-hand).

Mr. Stone also knew that Rockwell was being paid under its contract based on false claims. Mr. Stone knew that Rockwell's profits for its operation of the Plant consisted principally of award fee bonuses, and during his employment Mr. Stone learned that those bonuses were based on Rockwell's satisfactory performance in various ES&H areas, including "Waste Management," and that Rockwell was required to report ES&H problems to the Department of Energy ("DOE"). JA 179-80, 247-49. Although Mr. Stone reported ES&H problems he observed to Rockwell management, he and other Rockwell employees were specifically instructed not to discuss those problems with DOE. *Id.* 180, 280. As Mr. Stone has alleged from the beginning, and as the jury ultimately found, Rockwell concealed ES&H problems from DOE. Consistent with Mr. Stone's contention from the start, the jury's verdict, before trebling, represented 10% of the award fees Rockwell received during the period for which the jury found liability, which corresponded to the weight DOE gave Waste Management in its award fee evaluations. Tr. 2865.

*Mr. Stone Reported His Allegations to the Government.* In the years following the termination of his employment by Rockwell in March 1986, and *before* any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily approached the Government. JA 180-81, 250-67, 599-600, 615-21; CA App. 729-30. In a series of meetings over a two-year period, Mr. Stone reported the ES&H problems he had observed at Rocky Flats, including problems with

pondcrete and spray irrigation, and information regarding the award fee process; turned over 2,300 pages of related documents from the Plant; and advised the Government regarding sources of additional information and documents. JA 180-81, 257-58, 264. He described the danger of contamination posed by Rockwell's use of spray irrigation and he told the Government about Rockwell's practice of discharging untreated hazardous waste. *Id.* 252-53, 601, 616. He also discussed the faulty design and implementation of the pondcrete production system. *Id.* 600-01, 615-16. Mr. Stone also told the Government that Rocky Flats employees were not permitted to discuss such problems with DOE. *Id.* 251, 258. And, he discussed Rockwell's submission of false claims for award fees. *Id.* 616-17.

Among the documents Mr. Stone provided to the Government before any public disclosure was an October 13, 1982 Engineering Order in which he stated, with respect to the manufacturing process for pondcrete: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . ." Pet. App. 51a; JA 228. As the Tenth Circuit would later find, this Engineering Order "was explicit in articulating his belief that the proposed design for making pondcrete was flawed . . . . Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." Pet. App. 18a. In addition, Mr. Stone provided the Government with a document discussing the award fee process and specifically linking Rockwell's compensation to environmental protection. JA 247-48.

Mr. Stone also turned over an eight-page Engineering Calculation Sheet he wrote on the subject of "nitrate waste irrigation," which was based on his direct observation of the faulty spray irrigation system at Rocky Flats, CA App. 430-37, JA 224-25, as well as a 1984 memorandum in which Mr. Stone described the spray irrigation process as a "latent time bomb." JA 227. Mr. Stone also provided the Government with a copy

of his 1986 state court wrongful discharge complaint, which discussed his concerns about spray irrigation. *Id.* 250, 270.

*The Government Investigation.* In June 1989, the FBI and EPA executed a search warrant at Rocky Flats based on information provided by Mr. Stone. Pet. App. 4a; Pet. Br. 4.[2] The search warrant was supported by an affidavit signed by Agent Jon Lipsky, the same FBI agent with whom Mr. Stone had met beginning in 1986, and included sections concerning pondcrete and spray irrigation. JA 429, CA App. 152.[3]

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[2] Rockwell wrongly asserts that a 1992 "statement" by the U.S. Attorney announcing the plea agreement, that no "knowledgeable 'insider' c[a]me forward to identify serious environmental criminal conduct," negates Mr. Stone's direct and independent knowledge. JA 343. By that time, Mr. Stone no longer was employed at Rockwell and thus was not then an "insider." Perhaps more to the point, the United States consistently has stated in this case that Mr. Stone is an original source. *E.g.*, JA 571. Likewise, Rockwell's reliance on hearsay for the proposition that Mr. Stone is not an original source is misplaced. As an example, Rockwell refers to statements of Congresswoman Pat Schroeder, yet omits that she actually hailed Mr. Stone as a "hero" for his efforts. JA 344.

[3] Rockwell incorrectly contends that the FBI did not commence its investigation of pondcrete until FBI agents observed pondcrete blocks during their search in June 1989; indeed, this contention is inconsistent with Rockwell's other erroneous contention that Mr. Stone "copied" his pondcrete allegations from the affidavit Agent Lipsky submitted to procure the warrant for that very search. Pet. Br. 5. The truth is that Mr. Stone provided his knowledge about Rockwell's flawed pondcrete manufacturing process to the Government well before June 1989, JA 180-82, 228, 599-601, and that, as Rockwell concedes, the affidavit Agent Lipsky prepared to obtain the search warrant was based in part on information from Mr. Stone, Pet. Br. 4.

On March 26, 1992, Rockwell entered into a plea agreement with the Justice Department's Criminal Division under which it pled guilty to ten environmental crimes and agreed to pay $18.5 million in criminal fines. JA 50-72; Pet. App. 6-7a. Rockwell pled guilty to "illegal storage" and "illegal treatment" of pondcrete and saltcrete in violation of the Resource Conservation and Recovery Act. JA 53-57. Rockwell also pled guilty to "knowingly violating conditions and limitations in Rocky Flats'" National Pollutant Discharge Elimination System ("NPDES") permit, "by 'spray irrigating' water from Pond B-3 contrary to good engineering practices and in such a manner as to bypass Rocky Flats facilities which were necessary to maintain compliance with the plant's NPDES permit." *Id.* 63-65. Significantly, the release in the plea agreement specifically excluded Mr. Stone's FCA action and left open the possibility (which later occurred) that the Government would intervene in that action. *Id.* 70, 358-61.

*Mr. Stone's FCA Action.* Almost simultaneously with the Government's search of Rocky Flats (and years after he first approached the Government), Mr. Stone commenced this action in July 1989 alleging that Rockwell had fraudulently misrepresented the status of its ES&H performance to the Government in order to induce payments under its DOE contract. JA 38, 43-46.[4] As required by the FCA, Mr. Stone's complaint was filed under seal and thus was not served on Rockwell at that time, and Mr. Stone provided his complaint and a lengthy disclosure statement to the Government outlining additional information underlying his allegations, including

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[4] Well before the search warrant or any public disclosure, Mr. Stone informed the agents with whom he had met that he intended to file an FCA action. JA 301, 617-18.

information specifically relating to pondcrete and spray irrigation. JA 182-83; CA App. 491-561, JA 276-303.

*Rockwell's Unsuccessful Motion to Dismiss.* In late 1992, Rockwell moved to dismiss Mr. Stone's action under the direct and independent knowledge prong of the original source provision, arguing that Mr. Stone did not identify the specific documents containing the false claims or statements and the persons who submitted them. JA 73-93. Rockwell did not contest (nor could it) that Mr. Stone voluntarily provided his information to the Government prior to his filing suit.

In response, Mr. Stone submitted a lengthy sworn affidavit with attachments explaining his knowledge gained as a principal engineer for Rockwell of ES&H problems at the Plant, including those relating to pondcrete, spray irrigation, sewage treatment, plutonium and beryllium operations, which he reported to Rockwell management, JA 170-79, 184-246, and explaining that Rockwell's award fee bonuses were determined by its performance in various areas, including ES&H matters, *id.* 179-80, 247-49. Mr. Stone further explained that he provided this information to the FBI and EPA before he filed this FCA suit. *Id.* 180-82, 250-67.[5]

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[5] Significantly, though Rockwell seeks now to take back its statements, in its reply brief on the motion to dismiss it acknowledged Mr. Stone's direct and independent knowledge of pondcrete and spray irrigation: "At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination [and] that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment . . . ." CA App. 578 (citations omitted); *id.* 567 ("Stone's assertion that he told the FBI/EPA about ES&H 'problems' at Rocky Flats is, on the other hand, accurate.").

On February 2, 1994, the district court denied Rockwell's motion to dismiss. The court found, based on the factual record submitted, that Mr. Stone (i) had first-hand knowledge of ES&H problems acquired through his role as plant troubleshooter, (ii) knew that Rockwell's compensation was based on its compliance with ES&H standards, (iii) knew that Rockwell's compensation would be adversely affected if it did not perform in these areas, and (iv) was instructed by Rockwell management not to divulge ES&H problems to DOE. Pet. App. 61a. Thus, the court found, "Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Id.* Rockwell never sought reconsideration of the district court's decision in the ensuing five years before trial.

*Government Intervention.* In late 1995, the Government moved to intervene in this action, explaining that it had obtained information through a separate proceeding[6] as well as material submitted to the Government by Mr. Stone confirming Mr. Stone's FCA allegations and, in particular, those concerning Rockwell's misrepresentations as to pondcrete, saltcrete and spray irrigation. JA 347, 352.[7]

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[6] After Rockwell was dismissed as contractor at Rocky Flats, Rockwell sued the United States in the Court of Federal Claims, and the Government has defended on the ground, among others, that Rockwell committed fraud. JA 350-51.

[7] Rockwell opposed Government intervention and, in the criminal case, moved to enforce a provision of the plea agreement that it contended prevented the Government from intervening in this action. Holding that the Government's intervention did not breach the plea agreement, the district court denied the motion, and the Tenth Circuit affirmed.

Finding good cause, the district court granted the motion, and that ruling is not challenged here. Pet. App. 8a; JA 382-88.[8]

At the district court's request, Mr. Stone and the Government jointly filed an Amended Complaint on December 20, 1996, alleging, in Count One, FCA violations in connection with Rockwell's pondcrete, saltcrete and spray irrigation waste treatment operations. JA 394, 401-17. These claims had been in the case from its inception. The Government alleged additional common law claims, and Mr. Stone separately alleged FCA claims relating to Rockwell's plutonium and beryllium operations. *Id.* 417-23.[9] At no time before trial did

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*See United States* v. *Rockwell Int'l Corp.*, 124 F.3d 1194 (10th Cir. 1997), *cert. denied*, 523 U.S. 1093 (1998).

[8] The grand jury investigation proceeded for several years after Mr. Stone filed suit, complicating discovery proceedings. The Government initially deferred deciding whether to intervene when Justice Department "prosecutors expressed concerns . . . that any duplicative investigation by DOJ-Civil might interfere with their ongoing efforts." JA 356-57. Rockwell's claim that the Government declined to intervene at that point because it "felt that Stone lacked sufficient information to sustain his FCA claims" is just wrong. Pet. Br. 7. Indeed, when the Government did move to intervene in 1995, it informed the district court that its decision was based in part on information provided by Mr. Stone, and the Government then adopted Mr. Stone's existing pondcrete, saltcrete and spray irrigation claims. JA 352.

[9] Mr. Stone later withdrew his beryllium claim, and the plutonium claim was severed by the district court and has not been tried. Pet App. 8-9a; CA App. 1618-21. Following trial on the pondcrete, saltcrete and spray irrigation claims, the district court entered judgment pursuant to Fed. R. Civ. P. 54(b). Pet. App. 68a.

Rockwell seek dismissal of the Amended Complaint, nor did it seek to limit Mr. Stone's participation in the case.

Specifically, in the Amended Complaint, plaintiffs jointly alleged that, due to defective design and manufacturing, a substantial number of the pondcrete and saltcrete blocks Rockwell manufactured and stored outdoors were unstable and, as a result, hazardous materials leached onto the pads and the surrounding environment. JA 404, 406, 463-90. With respect to spray irrigation, plaintiffs alleged that Rockwell improperly disposed of wastewater by spraying it on the fields surrounding Rocky Flats, thereby polluting Woman Creek and other nearby water supplies. *Id.* 409-12, 490-93. Plaintiffs contended that Rockwell failed to report these environmental conditions to the Government, resulting in the fraudulent receipt of award fees under Rockwell's DOE contract. *Id.* 414-15. As in all cases, these claims – which Mr. Stone had pursued from the case's inception – were further detailed in the extensive discovery proceedings and summarized in the final pre-trial order. *Id.* 463-93.[10]

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[10] To avoid jury confusion over different sets of jury instructions, plaintiffs decided before trial to limit their damages claims to award fee periods beginning in 1986 and to narrow the evidence on spray irrigation to focus on Rockwell's contamination of Woman Creek in January 1987. CA App. 1104-09. Also before trial, Rockwell proposed prejudicial jury instructions on Mr. Stone's entitlement to up to 25% of the judgment and on Mr. Stone's dismissed retaliation claim, which Mr. Stone opposed. JA 447-56. Ultimately, the trial court approved a stipulation "regarding the agreement of no reference to Mr. Stone and the role of the relator beyond that which is already in the jury questionnaire giving the statement of the case," SA 108, and Mr. Stone did not testify. Such strategic decisions by counsel cannot be used (as Rockwell seeks now to do) to undermine a relator's original source

*Trial.* Plaintiffs' pondcrete, saltcrete and spray irrigation claims were presented jointly by Mr. Stone and the United States during a six-week trial. Lawyers for Mr. Stone and the Government cooperated fully in prosecuting the case. On April 1, 1999, the jury returned a verdict finding that Rockwell made false statements in violation of the FCA for the three six-month award fee periods from April 1, 1987 through September 30, 1988. JA 548-49. The jury awarded damages in the amount of $1,390,775.80, which, under the treble damage provision of the FCA, resulted in a final judgment of $4,172,327.40. Pet. App. 10a, 68a.[11]

*Rockwell's Post-Judgment Challenge to Mr. Stone's Participation in the Judgment.* After the jury rendered its verdict, without any proper procedural vehicle in which to do so, Rockwell sought to reargue the district court's prior original source ruling by contesting entry of judgment in favor of Mr. Stone. CA App. 1135-54. The Government agreed with Mr. Stone that the district court's 1994 original source ruling was correct and should not be revisited. JA 568-71. The Government also stated that it did not question Mr. Stone's

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status. Indeed, as noted, at no time after Government intervention through trial did Rockwell seek dismissal of Mr. Stone from the case.

[11] The jury assessed damages by awarding a single, aggregate figure that was not broken down by award fee period. JA 548-49. The jury also was not asked to make any specific findings with regard to pondcrete, saltcrete or spray irrigation. The jury's award of $1,390,755.80 (before trebling) is exactly 10% of the total award fee bonus that Rockwell received from October 1, 1986 to September 30, 1989, corresponding with the 10% weight DOE gave to "Waste Management." Pet. App. 30a. The jury rejected plaintiffs' request for additional damages incurred by the United States to repair the environment as a result of Rockwell's illegal waste disposal practices.

proper status as a *qui tam* plaintiff and that "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests." *Id.* 571. The district court denied Rockwell's motion and entered final judgment on May 13, 1999. Pet. App. 66-68a, JA 29.[12]

*Appeal.* Rockwell appealed on various grounds, including the original source issue, and cross-appeals were filed by plaintiffs on damages. The Government also appealed from the dismissal of its common law claims.

On September 24, 2001, in an opinion authored by Judge Holloway, a Tenth Circuit panel majority affirmed the district court's rulings in their entirety. The Court of Appeals held that the district court had correctly determined that Mr. Stone was an original source because he had direct and independent knowledge of the allegations underlying his claims. The court specifically held that Mr. Stone's observation in his 1982 Engineering Order that the pondcrete process would not work, among other record evidence, constituted direct and independent knowledge of the pondcrete claim as to which Rockwell was found liable. Pet. App. 17-20a.

Judge Briscoe dissented. The dissent did not take issue with the panel majority's articulation of the direct and independent knowledge requirement, but rather with the majority's application of the law to the facts of this case. Pet. App. 44-48a.

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[12] Rockwell also raised post-trial a claim that the FCA's *qui tam* provisions are unconstitutional. CA App. 1459-71. The district court denied that request, Pet App. 67a, and this Court has denied review.

On November 2, 2001, Rockwell sought rehearing and rehearing *en banc*, arguing that there was an *intra*-circuit split as to the original source issue. JA 4. On March 4, 2002, the Tenth Circuit reaffirmed its ruling that Mr. Stone had direct and independent knowledge of the information on which his allegations were based, and directed a limited remand on whether Mr. Stone had satisfied the second prong, *i.e.*, whether he voluntarily provided his information to the Government before filing this FCA action. Pet. App. 15-23a, 43-44a. The suggestion for rehearing *en banc* was denied. *Id.* 1a.

*Limited Remand.* On December 17, 2002, the district court issued an order finding that Mr. Stone provided to the Government documents relevant to the ES&H matters at issue, including his Engineering Order related to pondcrete, prior to bringing this suit. Pet. App. 73a.[13]

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[13] At oral argument before the district court on limited remand, the court indicated that it was rejecting Rockwell's position that negative inferences could be drawn from FBI 302 reports about whether Mr. Stone communicated his concerns about pondcrete in his meetings with the FBI. JA 594-95. In its written decision, however, the district court changed course, observing that it is "fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks, . . . there would be some reference to it in the agent's reports." Pet. App. 74a. Mr. Stone subsequently filed a motion for reconsideration in order to submit affidavits from Mr. Stone and his counsel that made clear that pondcrete was indeed discussed at these meetings. JA 591-98. The district court denied the motion. JA 624-25. The Tenth Circuit correctly rejected the district court's finding with respect to the 302 reports, Pet. App. 52a, and denied as moot Mr. Stone's motion to supplement the record. The additional affidavits, which Rockwell ignores, confirm that Mr. Stone discussed both pondcrete and spray irrigation in the 1986-88 meetings with the Government. JA 181-82, 599-601, 615-21.

On March 5, 2004, the Tenth Circuit reaffirmed the judgment of the district court in all respects as set forth in its previous opinion. Pet. App. 52-53a. The Court of Appeals specifically held that by providing the Government with his Engineering Order, Mr. Stone satisfied the second prong of the original source test requiring the relator to provide his information voluntarily.[14] *Id.* 52a. Judge Briscoe again dissented, for the same reasons as in her prior dissent. *Id.* 53-55a.

On April 16, 2004, Rockwell filed another petition for rehearing and rehearing *en banc*, contending that the Tenth Circuit's decision presented an *intra*-circuit conflict as to the second prong of the original source test. On January 4, 2006, the Tenth Circuit denied Rockwell's second petition. Pet. App. 57a. This Court subsequently granted certiorari.

## SUMMARY OF ARGUMENT

The False Claims Act plainly states that to be an "original source" a relator must have direct and independent knowledge of the information on which the allegations in his complaint are based, and he must have disclosed that information to the Government prior to filing suit. Rockwell's proposed extra-textual standard would require relators to have first-hand knowledge of the particular pieces of paper containing the false statements *and* the evidence introduced at trial that proves the claim to a jury (as divined from the jury verdict). Rockwell's standard is utterly divorced from the plain language of the statute and its history.

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[14] Because the Tenth Circuit held that Mr. Stone was an original source of his pondcrete allegations, its statement that Mr. Stone's knowledge of spray irrigation was "moot" is *dicta*. Pet App. 50a.

The FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), prohibits only strictly parasitic lawsuits by barring actions based on allegations or transactions that were previously publicly disclosed unless *either* the Government intervenes "or" the relator is an original source. Here, both exceptions are met: Mr. Stone is an original source, as the district court (twice) and the Court of Appeals (twice) have held, and the Government intervened in the action. Rockwell, ignoring the disjunctive nature of the bar's two exceptions, argues that even after the Government's intervention, and even after the relator has already been held to be an original source, the original source provision can be revisited again and again at any time. This interpretation is wrong: once a relator has been determined to be an original source and the Government intervenes, there is no reason to revisit that determination. To do so would be contrary to the language and purpose of the original source provision.

Regardless, Mr. Stone is an original source. The plain language of the original source definition, 31 U.S.C. § 3730(e)(4)(B), requires a relator to have direct and independent knowledge of the information on which his allegations are based, and to have disclosed that information to the Government prior to filing suit. Rockwell asserts that "the text of the statute and governing canons of construction do not permit" the Tenth Circuit's interpretation, Pet. Br. 26, but then proceeds to apply an extra-statutory gloss on each aspect of the original source definition that cites neither the plain language nor a single canon of construction. It argues that "direct" knowledge cannot include knowledge gained through the use of inference, that "information on which the allegations are based" must mean the evidence introduced at trial that establishes both the false statement and the true state of facts, and, despite a conceded lack of basis in the plain text, that there should be a new requirement that the significance or quantum of information meet a certain threshold. Each of these arguments is not only unsupported, but actually contradicted, by the text of the statute.

Mr. Stone is an original source. Over the five and a half years he worked as an engineer at Rocky Flats, Mr. Stone learned that Rockwell knowingly hid ES&H violations in order to continue receiving award fee bonuses from the Government. He learned through first-hand observation that Rockwell's process for manufacturing pondcrete was flawed, that its use of spray irrigation posed a danger of environmental contamination, that Rockwell instructed its employees, including Mr. Stone, not to discuss its environmental violations with DOE personnel, and that the award fees Rockwell received were paid based in part on its asserted environmental compliance. This is the information underlying and supporting the allegations in Mr. Stone's complaint, and this is the information Mr. Stone voluntarily provided to the Government in a series of meetings he initiated three years *before* he filed suit. Under *any* standard, Mr. Stone is an original source. The decisions below should be affirmed.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AFFIRMANCE

The plain language of the *qui tam* provisions of the False Claims Act makes clear that to be an "original source" a relator must have first-hand knowledge of the *information* on which the *allegations* in his complaint are based, and he must have disclosed that information to the Government prior to filing suit. Rockwell repeatedly insists that its contrary interpretation of the original source provision is "faithful to the text." Pet. Br. 25, 32. It is not. The standard Rockwell asks this Court to adopt – that the relator must have direct and independent knowledge of the particular evidence introduced at

trial that establishes both the false statement and the true state of facts – is both unmoored from and contrary to the plain language of the *qui tam* provisions of the FCA, as well as their structure, purpose and history.[15]

### A. The Original Source Provision and the Plain Meaning of "Direct and Independent Knowledge"

The FCA's *qui tam* provisions, 31 U.S.C. § 3730(b)-(g), "empower private persons, known as 'relators,' (1) to sue, on behalf of the government, persons who knowingly have presented the government with false or fraudulent claims (as . . . defined by 31 U.S.C. § 3729); and (2) to share in any proceeds ultimately recovered as a result of such suits, *see generally* 31 U.S.C. § 3730(d)." *United States ex rel. S. Prawer and Co.* v. *Fleet Bank of Me.*, 24 F.3d 320, 324 (1st Cir. 1994) (emphasis omitted). To accomplish the statute's purpose of empowering private persons to come forward, the statute provides that a successful relator is entitled to a portion of the recovery – up to 30% – and to costs and attorneys' fees. *Id.* § 3730(d). *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("'[O]ne of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions

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[15] Rockwell relies on public disclosure in order to trigger the original source requirement, yet the level of detail in the news articles on which Rockwell relies does not include the trial evidence that Rockwell now contends Mr. Stone must have possessed when he filed this suit. Rockwell cannot have it both ways. Were this Court to adopt Rockwell's original source standard, additional inquiry would be necessary as to whether the original source provision is even triggered in this case.

by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

Section 3730(e) of the FCA sets forth four types of actions that, in certain circumstances, are barred. The bar at issue in this case states as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

Subsection (e)(4)(A) prohibits what are commonly referred to as "parasitic" lawsuits, by barring those suits where the allegations or transactions have been publicly disclosed, with two important exceptions separated by the disjunctive "or." *See Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.") (citing *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-40 (1978)); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The first exception, which arises when "the action is brought by the Attorney General," applies here because the Government intervened in 1996, thus rendering the public disclosure bar inoperative.[16] *See infra*, pp. 26-27. The second exception, which Mr. Stone also satisfies but need not even be addressed given the Government's intervention, arises where "the person bringing the action is an original source." Subsection (e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

The "direct and independent" knowledge requirement is clear on its face and should be given its plain meaning. "Direct" knowledge is "knowledge derived from the source without interruption *or* gained by the relator's own efforts rather than learned second-hand through the efforts of others." *United States ex rel. Laird* v. *Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355 (5th Cir. 2003) (citing Webster's New International Dictionary 640 (3d ed. 1961)) (emphasis added). *See also United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) (defining direct knowledge as knowledge "marked by absence of an intervening agency") (citation omitted). "'Independent

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[16] Senator Grassley, the chief Senate sponsor of the 1986 amendments, makes this very point in his *amicus* brief. After all, it is the Government's interests that are to be protected by the public disclosure bar. Thus, upon intervening, the Government can limit the relator's participation by availing itself of the range of tools it is provided in § 3730(c)(2).

knowledge' is knowledge that is not itself dependent on public disclosure." *Id.* (citation omitted).[17]

Thus, for the "direct and independent" knowledge requirement to be met, the relator must have first-hand knowledge that was gained independently of the public disclosure. Here, as we show further below, Mr. Stone, who developed his knowledge of Rockwell's fraud directly and independently during the course of his employment, easily satisfies the original source requirement.[18]

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[17] The Tenth Circuit describes "independent" slightly differently: "independent knowledge means that 'the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources.'" Pet. App. 15a (citation omitted). This variation has no impact on this case, as Mr. Stone's knowledge is based on his personal observations of Rockwell's ES&H practices while he was employed at Rocky Flats. JA 289-90, JA 270.

[18] The archetypal *qui tam* plaintiff – a whistle-blowing employee – generally satisfies the direct and independent knowledge requirement by virtue of his first-hand knowledge of the defendant's operations. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991). Other relators who develop evidence of fraud through their own investigative efforts likewise can possess direct and independent knowledge but must do so through the work they put into uncovering and exposing the fraud. *See, e.g., Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1046 (10th Cir. 2004). Mr. Stone satisfies either interpretation. Rockwell's proposed standard would bar almost all plaintiffs, despite their very real contributions to the Government's enforcement of the FCA.

### B. The Statute Clearly Provides That the Direct and Independent Knowledge an Original Source Must Have Is "Information on Which the Allegations Are Based"

The statute provides that the direct and independent knowledge a *qui tam* relator must have is knowledge "of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit held, this means that a plaintiff must show that he has direct and independent knowledge of the information "underlying or supporting" the allegations of his complaint. Pet. App. 21a (citation omitted); *see also Springfield*, 14 F.3d at 656 ("Significantly, the 'original source' provision requires the relator to possess direct and independent knowledge of the 'information' *underlying* the allegation, rather than direct and independent knowledge of the 'transaction' itself.") (emphasis added). Contrary to Rockwell's contention, the Tenth Circuit did not "merely require[] relators to know some background facts 'underlying or supporting' the 'fraud allegations contained in the plaintiff's *qui tam* complaint.'" Pet. Br. 13. It simply held, consistent with the plain text of the statute, that the relator must have direct and independent knowledge of "the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." Pet. App. 21a.

Mr. Stone and Rockwell agree that the information in question is the information underlying the relator's complaint, rather than the publicly disclosed information. Pet. Br. 26 n.13. *See United States ex rel. Mistick PBT* v. *Hous. Auth. of Pittsburgh*, 186 F.3d 376, 389 (3d. Cir. 1999) (Alito, J.); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). Yet, Rockwell seeks to go further, arguing that the plaintiff must have knowledge of every element of a claim, or that the trial evidence and jury verdict retroactively may negate a relator's "knowledge of the information on which the allegations are based." Rockwell is wrong.

Indeed, contrary to Rockwell's position, it is clear from the statutory text that "the information" is not "the allegations" and also that "the information" is not the evidence introduced at trial or the jury verdict. Congress could have chosen to require an original source to have direct and independent knowledge of "the allegations," but it did not. Congress also easily could have used the word "evidence," but, again, it did not. *See Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that the starting point in every case involving construction of a statute is the language itself.") (citations omitted). Congress instead chose the words "information on which the allegations are based," which cannot mean evidence or even knowledge of every factual allegation necessary to proceed with an action. Moreover, Congress separated the words "information" and "allegations" and the phrase "are based" ensures that that distance is limited – *i.e.*, "the information" is not *any* information but rather the information "on which the allegations are based."

Finally, "allegations" in subparagraph (B) must refer to the allegations in the *qui tam* complaint. *See* Pet. App. 21a (citing *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999)); *Mistick*, 186 F.3d at 388-89. Rockwell seems to agree. *See* Pet. Br. 26 n.13.

### C. Rockwell's Position as to What "Information" a Relator Must Possess To Be an Original Source Is Contrary to the Plain Language of the Statute

Rockwell departs from the statute's plain language when it asserts that "direct" knowledge cannot include "inferences." Pet. Br. at 31. As Rockwell concedes, "direct" simply means "first-hand" – that is, "obtained . . . through his own efforts, not through the efforts of others." *Id.* at 30. Clearly, such first-hand knowledge may include reasonable inferences deduced from one's first-hand knowledge. The case law draws no distinction between inferences, deductions and other types of direct knowledge. *See Minn. Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050

(8th Cir. 2002) (holding that plaintiff nurse-anesthetists' personal observation of anesthesiologists filling out forms used for billing with misleading information "would support an inference that the anesthesiologist[s] submitted false bills"); *Kennard*, 363 F.3d at 1046 ("It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud."); *see also United States* v. *Joy*, 192 F.3d 761, 767 (7th Cir. 1999) ("Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences."). And there is no reason to draw such a distinction here.

Rockwell also departs from the statute's plain language when it argues that "'the information' that § 3730(e)(4) puts at issue is, most logically, the information that the relator relies upon to establish his allegation of fraud." Pet. Br. 26. Indeed, pervasive throughout Rockwell's brief is the assumption – which finds no support in the text of the statute – that the original source provision has to do with the *evidence* used to "establish" an FCA claim. By its terms, the original source provision is clearly concerned with what is *alleged* in the relator's complaint. *See* Black's Law Dictionary 81 (8th ed. 2004) (defining an "allegation" as a "formal statement of a factual matter as being true or probable, *without its having yet been proved*") (emphasis added).[19] And, even then, the

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[19] That a court must assess the complaint's allegations does not mean it may not consider other evidence. Indeed, in ruling on Rockwell's motion to dismiss, the district court considered Mr Stone's affidavit with attachments and his confidential disclosure statement, in addition to material submitted by Rockwell. Rockwell does not contest the propriety of the district court having done so. But none of this means that a court may rewrite the statute's use of "allegations" to mean trial evidence.

provision is concerned not with the relator's knowledge of the allegations *per se*, but of the *information* on which the allegations are based. The *evidence* that a plaintiff (or, more likely, his counsel) later decides to introduce at trial to "establish his allegation of fraud" reflects the development of the case in discovery and tactical decisions made to present the case to a jury. It has no relevance to the question of whether the relator is an original source as to his *allegations*.[20]

Simply put, if accepted, Rockwell's position would require the Court to rewrite the statute and add words that Congress did not include. The Court declined to do just that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and

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[20] Rockwell's argument that the word "basis" in the Foreign Sovereign Immunities Act somehow means that the original source provision requires knowledge of evidence of fraud is without merit. Pet. Br. 26-27. The case Rockwell uses to construct this theory, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), addresses exceptions to a wholly different statute, which provides that foreign states shall not be immune "in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605 (a)(2). There, the Court held that commercial activities unrelated to the personal injury claim were insufficient to satisfy the statutory exception, which reflects the plain language of that statute. *Nelson*, 507 U.S. at 351, 357-58. In any event, the use of the phrase "based upon" in § 1605(a)(2) is analogous to the use of the phrase "an action under this section based upon" in subparagraph (A) of the public disclosure bar, 31 U.S.C. § 3730(e)(4), *not* to the use of the phrase "allegations are based" in the original source definition in subparagraph (B). In subparagraph (B), Congress required relators to have "direct and independent knowledge of the information on which the allegations are based," *not* "allegations based upon direct and independent knowledge" or "direct and independent knowledge of the basis of the action."

it similarly should decline to do so here. The plaintiff in *Hess* brought suit under the original version of the FCA based *entirely* on information he had copied from a criminal indictment; the defendants and the Government (participating as *amicus curiae*) challenged his relator status, arguing that Congress did not intend to allow strictly parasitic actions. *Id.* at 545. In rejecting the challenge, the Court gave effect to the plain words of the statute, which at that time simply provided that "Suit may be brought and carried on by any person." *Id.* at 546. Following the Court's decision in *Hess*, Congress amended the FCA by creating what would come to be referred to as the "government knowledge bar," which barred all *qui tam* actions "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded).

Then, in 1984, the "reverse" *Hess* came in *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984). In *Dean*, the Government knew about the allegedly fraudulent claims for Medicare reimbursement the defendant-doctor had submitted because the relator, the State of Wisconsin, acting pursuant to statutorily-imposed duty, had reported the fraud to the U.S. Department of Health and Human Services. *Id.* at 1104. Nevertheless, as this Court did in *Hess*, the Seventh Circuit in *Dean* gave effect to the plain language of the statute: "Although Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by Hess, the language and effect of the 1943 amendment in fact [wa]s much broader." *Id.* The relator's action was dismissed. *Id.* at 1107.

Then, in 1986, Congress amended the statute again, creating the original source provision that is at issue in this case. The result here should be no different than in *Hess* and *Dean*: the plain language of the statute should govern. Simply put, Rockwell's formulation, whatever its policy merits, is better directed to Congress than to the Court:

> As the Supreme Court stated in [*Hess*] when it refused to create the jurisdictional bar that Congress later provided by the 1943 amendment to the False Claims Act: "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the [state] thinks Congress should have done rather than at what it did . . . . But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not."

*Dean*, 729 F.2d at 1106-07 (quoting *Hess*, 317 U.S. at 546-47).

Rockwell contends that it is permissible to reassess the original source's "information" at every stage of the litigation "[b]ecause § 3730(e)(4) is jurisdictional in nature." Pet. Br. 28-29.[21] Rockwell is incorrect. First, although § 3730(e)(4)(A) refers to "jurisdiction," the application of the original source provision following the Government's intervention does not

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[21] In the cases Rockwell cites on this point, Pet. Br. 29, the plaintiffs, unlike Mr. Stone, voluntarily dismissed the very causes of action that conferred jurisdiction and went forward on other, different claims. *See Wellness Cmty.-Nat'l* v. *Wellness House*, 70 F.3d 46, 48-49 (7th Cir. 1995); *Boelens* v. *Redman Homes, Inc.*, 759 F.2d 504, 506, 512 (5th Cir. 1985). In *Hafter*, 190 F.3d at 1165 n.10, also relied on by Rockwell, Pet. Br. 29, the court merely noted that it did not need to discuss claims that were not mentioned in the Second Amended Complaint to assess the relators' direct and independent knowledge. None of this is relevant here. From the beginning, Mr. Stone's claims included pondcrete and spray irrigation, and he never dropped either claim from the case. JA 287, 289; CA App. 210-11, 218, 221.

actually implicate the court's subject-matter jurisdiction. *See United States ex rel. Fallon* v. *Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996) (Easterbrook, J.); *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97, 102 n.5, 103 & n.7 (3d Cir. 2000) (Alito, J.) (citing *Fallon*).[22]

Where, as here, a relator has been determined to be an original source and the Government later intervenes, there is no reason to revisit the original source determination. Indeed, to revisit the original source determination in these circumstances would be an extra-statutory event, and could only properly be denoted a motion for reconsideration, which was not (and could not be) made here. *See, e.g., Servants of the Paraclete* v. *Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (motion to reconsider is warranted only upon an intervening change in controlling law, emergence of new evidence previously unavailable, or need to correct clear error or prevent manifest injustice).

Moreover, even were a court to reconsider a relator's original source status post-trial on the theory that it is a matter of subject-matter jurisdiction, Rockwell's argument would still fail. Subject-matter jurisdiction is assessed based upon the

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[22] The Tenth Circuit rejected this argument, holding that "[i]ntervention . . . does not automatically endow the court with subject-matter jurisdiction over both the claims by the United States and by the relator." Pet. App. 12-13a. This was error. The case on which the Tenth Circuit principally relied, *Federal Recovery Services, Inc.* v. *United States*, 72 F.3d 447, 450 (5th Cir. 1995), dealt with the entirely separate question of whether a relator who has been dismissed from an action on original source grounds can later seek to re-join the action to obtain attorneys' fees, pursuant to § 3730(d), from a settlement between the Government and defendant. That situation is not present in this case.

facts *as they existed at the time the complaint was filed, and not after trial. See Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) ("In applying the jurisdictional bar here by looking to the facts existing when Keene filed each of its complaints, the Court of Federal Claims followed the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mullan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) ("Subject-matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'ous[t]' the court of jurisdiction.") (Scalia, J., concurring in judgment) (citations omitted); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("To be entitled to removal under § 1441(d), [petitioners] must show that they are entities 'a majority of whose shares or other ownership interest is owned by a foreign state.' [31 U.S.C.] § 1603(b)(2). We think the plain text of this provision, *because it is expressed in the present tense*, requires that instrumentality status be determined at the time suit is filed.") (emphasis added).[23]

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[23] Similarly, a post-filing change in a party's citizenship will not destroy diversity jurisdiction. *See Freeport-McMoRan, Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam) ("[D]iversity of citizenship is assessed at the time the action is filed."); *see also Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004) ("To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 [in *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829)] that "where there is no change of party, a jurisdiction depending on the condition of a party is governed by that condition, as it was at the commencement of the suit."). The same rule applies to the amount in controversy requirement. *See Klepper* v. *First*

The Tenth Circuit also correctly rejected Rockwell's argument that Mr. Stone was required to have direct and independent knowledge of actual false claims submitted to the Government to obtain payment. As the Tenth Circuit held, the "plain text of the FCA . . . belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess 'direct and independent knowledge of the *information on which the allegations are based.*'" Pet. App. 20a (emphasis in original). *See also Hafter*, 190 F.3d at 1162.

Rockwell's argument is an incorrect reading of *Mistick*, 186 F.3d 376. Rockwell reads *Mistick* as requiring a relator to have direct and independent knowledge of the false statement itself, as well as the true state of facts. Pet. Br. 32-33. But it is not clear that this is what *Mistick* holds, and certainly nothing in the text of the FCA supports this reading. In particular, subsection (e)(4)(B) nowhere provides that the requisite knowledge be of the actual misrepresentation itself. Moreover, the relator in *Mistick* "acknowledge[d] that 'the misrepresented facts were discovered by Mistick . . . pursuant to'" the FOIA request. *Id.* at 385. The Third Circuit therefore held that the relator was not an original source because it learned of defendants' alleged misrepresentations from a FOIA request

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*American Bank*, 916 F.2d 337, 340 (6th Cir. 1990) ("In a federal diversity action . . . , [w]hen determining whether the amount in controversy has been satisfied, we examine the complaint at the time it is filed. Jurisdiction, once established, cannot be destroyed by a subsequent change in events.") (citations omitted). It also is well established that the existence of federal question jurisdiction does not depend on the viability of the merits of the cause of action pleaded, except in limited circumstances not applicable here. *See Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

and civil discovery in a state court action – both not at issue here. *Id.* at 383, 385.

Indeed, if Rockwell's view of *Mistick* were to become the standard, the original source provision effectively would be read out of the FCA. No engineer or other "shop floor" employee like Mr. Stone would qualify as an original source because he would have no opportunity to learn of the actual false claims. Meanwhile, lawyers and compliance workers, whose jobs assembling certifications and sending out submissions for payment to the Government vest them with knowledge of false claims, would be ineligible for original source status under Rockwell's standard because they would be relegated to the back office and consequently unaware of the true state of facts on the shop floor. This result is not mandated by the language of the statute and also conflicts with the statute's purpose. It should be rejected.

### D. Rockwell's Position as to the Significance or Amount of "Information" a Relator Must Possess To Be an Original Source Also Finds No Support in the Statute

Rockwell's proposed additional requirement of a certain significance or quantum of information an original source must possess likewise conflicts with the statutory text.

Rockwell appropriately concedes that "§ 3730(e)(4)(B) does not expressly require that the relator's information be sufficient to sustain the core allegation of fraud." Pet. Br. 35. But Rockwell nonetheless recommends an extra-textual standard on the theory that "any other standard would be subjective and difficult to apply at the outset, where it is typically not clear what the significance of certain information will be." *Id.* Rockwell then offers that "[c]ourts have described the necessary quantum of evidence in various ways, sometimes referring to 'essential,' 'substantive,' or 'core' information, but they are in general agreement that the information must have meaningful *evidentiary* value in

establishing the alleged fraud." *Id.* (internal citation omitted; emphasis added). There are two major problems with this argument.

*First*, as already noted, when it enacted subsection (e)(4)(B), Congress did not use any of the words Rockwell now offers; Congress instead used the phrase "the information on which the allegations are based." Rockwell suggests that this means "essential elements" or "core" or "substantive" information – all terms Congress knows how to use and indeed has used in other contexts. *See, e.g.*, 42 U.S.C. § 1320a-7a (essential elements); 12 U.S.C. § 4805 (core information); 31 U.S.C. § 6104 (substantive information). As this Court has said on more than one occasion, Congress knows how to choose language to achieve a desired result. *See, e.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there.") (citation omitted); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("Congress clearly knows how to use mandatory language when it so desires.").

Next, Rockwell argues that a relator must have direct and independent knowledge of *all* elements of the fraudulent transaction. Pet. Br. 31. Rockwell's argument cannot be squared with the use of the word "allegations" in the statute itself. *See Springfield*, 14 F.3d at 656-57 ("On the basis of plain meaning, then, we find that § 3730(e)(4)(B) does not require that the *qui tam* relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction."). Moreover, Congress *did* use one such phrase – "essential elements" – elsewhere in the *qui tam* provisions, but tellingly *not* in the provision in which Rockwell seeks to add those non-textual words. *See* 31 U.S.C. § 3731(c); *see also Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion.") (citation omitted).[24]

*Second*, a related statutory provision, which Rockwell ignores entirely, speaks clearly to the issue of the significance or amount of information an original source must possess in a way that completely contradicts Rockwell's argument. Section 3730(d), which addresses a successful relator's entitlement to a percentage of any monetary recovery, makes clear that Congress treated the question of the amount of information an original source possesses not as a particular threshold to be satisfied to bring suit but rather as one factor among others in determining – *as between the Government and the relator* – the relator's particular share of the recovery along a sliding scale of ranges from 0% to 30%. Thus, Rockwell's argument that the relator's knowledge must prove the FCA violation is plainly wrong. Pet. Br. 32.

Specifically, §§ 3730(d)(1) & (2) assign a sliding scale of possible awards for successful *qui tam* relators according to the level of the relator's contribution to the case. Both provide for a main recovery range for the relator and both provide for

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[24] Of course, Rules 8, 9(b), 11, and 12 of the Federal Rules of Civil Procedure, among others, provide vehicles for a defendant to challenge the legal sufficiency of the allegations in a complaint. But that is not what the FCA provides. *See United States ex rel. Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) ("[A]lthough Fed. R. Civ. P. 9(b) requires qui tam plaintiffs to plead fraud with particularity, this inquiry is separate from the original source inquiry under § 3730(e)(4)."); *Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566-67 (11th Cir. 1994). Indeed, Rockwell challenged the legal sufficiency of Mr. Stone's original complaint under Rules 9(b) and 12(b)(6), and the motion was denied. CA App. 101-04.

attorneys' fees. Paragraph (1) has one additional provision that paragraph (2) lacks, however, providing that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in" one of the fora also enumerated in subsection (e)(4)(A), the court may award an "appropriate" sum of no more than 10%.[25]

Thus, according to the statute, if the action is "primarily based" on publicly disclosed information and the relator did not provide that information, the relator, who must be an original source under subsection (e)(4), *see Merena*, 205 F.3d at 105, may receive only 0% to 10% of the recovery. The precise amount of recovery depends on "the significance of the information" and "the role of the person bringing the action in advancing the case to litigation." In other words, in discussions between the relator and the Government *after* there is a recovery, a relator whose action is primarily based on information of which he does not have direct and independent knowledge is possibly given a smaller portion of the recovery (unless he played a major "role . . . in advancing the case to litigation"), but his original source status is clearly intact.

The legislative history contradicts Rockwell's alternative reading decisively. Representative Berman, the House sponsor of the 1986 amendments, explained § 3730(d)(1) this way:

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[25] Rockwell correctly notes that the courts below have not determined the amount of attorneys' fees to be awarded Mr. Stone as prevailing party in this case. Contrary to Rockwell's contention, however, the statute does not require a relator to be an original source to receive "reasonable attorneys' fees and costs."

> If the Government comes into the case, the person is guaranteed a minimum of 15% of the total recovery *even if that person does nothing more than file the action in federal court.* This is in the nature of a "finder's fee" and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%. . . . The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but where *the essential elements* of the case were provided to the government or news media by someone other than the qui tam plaintiff. In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff.

132 Cong. Rec. 29322 (Oct. 7, 1986) (emphasis added), *quoted in Merena*, 205 F.3d at 106; *see also id.* ("A person is an original source if he had *some* of the information related to the claim which he made available to the government . . . in advance of the false claims being publicly disclosed.") (emphasis added).[26]

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[26] The comments of Senator Grassley, the Senate sponsor, are to like effect: "[A] 10-percent cap is placed on those 'original sources' who bring cases based on information already publicly disclosed where only *an insignificant amount of that information stemmed from that original source*." 132 Cong. Rec. 28580 (Oct. 3, 1986) (emphasis added); *see also id.* at 20536 (Aug. 11, 1986).

Thus, if the question of the significance and amount of information possessed by a relator can be dealt with flexibly at the award stage, it cannot be that Congress intended the same issue to be dealt with in a contradictory manner at an earlier stage in the case. *See Smith* v. *United States*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute.") (quoting *United States Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (applying "central tenent of interpretation" that a statute is to be considered in all its parts when construing any one of them). To quote Rockwell quoting this Court in *Hess*, "Congress could have 'provided specifically for the amount of new information which the informer must produce to be entitled to the reward,' but it did not do so." Pet. Br. 21. Rockwell's invitation to set an artificial minimum threshold that is not found in the statutory provision at issue should be rejected.

### E. The History of the Statute Supports Mr. Stone's Plain Language Reading

The *qui tam* provisions reflect the important balance that Congress struck in 1986 between encouraging private enforcement of the FCA and preventing truly "parasitic" lawsuits. Since its initial enactment in 1863, the FCA has been substantively amended twice: in response to the *Hess* decision in 1943, and then again in response to a series of decisions, most notably *Dean* in 1984.[27] As relevant here, when Congress

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[27] As noted earlier, following *Hess*, Congress amended the FCA's *qui tam* provisions to bar all *qui tam* actions "based on evidence or information the Government had when the action was brought." Pub. L. No. 78-

amended the FCA in 1986, the government knowledge bar was specifically identified as one reason why the *qui tam* provisions had been rendered largely ineffective as a mechanism to fight government contractor fraud. The Senate sought to address this problem "to make the False Claims Act a more effective weapon against Government fraud." S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

Indeed, the amendments ultimately enacted reflected the Senate's view that the "overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." *Id.* at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89; *see also* 132 Cong. Rec. 29321 (Oct. 7, 1986). Among the provisions added were a provision increasing monetary awards, § 3730(d)(1)-(2); a provision adopting a lower burden of proof, § 3731(c); and a provision allowing *qui tam* plaintiffs to continue to participate in their actions even after Government intervention, § 3730(c). Finally, Congress added back "the original source provision eliminated from the 1943 Senate bill," § 3730(e)(4). *S. Prawer*, 24 F.3d at 326.

What Rockwell characterizes as a "limited exception" to the jurisdictional bar, Pet. Br. 24, therefore, was actually a

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213, 57 Stat. 608, 609 (1943) (codified as 31 U.S.C. § 3729 *et seq.* (1982)) (superseded). The purpose of the "government knowledge bar" was to prevent parasitic lawsuits like the one in *Hess*. But it later became obvious that the language Congress adopted went much too far, which led to the 1986 amendments (and not judicial rulemaking). *See* S. Rep. No. 99-345, at 2-6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-71 (noting that the number of insiders willing to come forward with evidence of wrongdoing waned after passage of 1943 amendments).

major shift in Congressional policy. *See Hughes*, 520 U.S. at 950 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued."). Congress recognized the difficulty of detecting fraud without the cooperation of people who observe the fraud, *see* S. Rep. No. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269, and specifically sought to incentivize such insiders to come forward with what they know and bring suits on behalf of the Government, *see* 132 Cong. Rec. 29322 ("The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government.") (statement of Rep. Berman).

Thus, the history of the 1986 amendments makes clear that its financial incentives are specifically intended "to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67 (1986). "[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.* Indeed, this cooperation between the Government and relators has resulted in substantial revenues to the U.S. Treasury since the 1986 amendments. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers $1.4 Billion in Fraud & False Claims in Fiscal Year 2005; More Than $15 Billion Since 1986 (Nov. 7, 2005), *available at* www.usdoj.gov/opa/pr/-2005/November/05_civ_595.html.

This case falls squarely within the statute's purpose. Mr. Stone voluntarily approached the Government in 1986 and provided the Government with his information. Mr. Stone continued to cooperate fully with the Government during the criminal investigation and, after he commenced this FCA action, worked cooperatively with the Government to bring this

case to trial. The jury's verdict confirmed Mr. Stone's allegations. Where, as here, the Government considers the relator an original source of a claim that, after all, is the *Government's* claim, there is no basis to deny the relator a share of the recovery that the defendant owes on account of proven fraud. Indeed, it would totally defeat Congress's purpose now – 17 years later – to deny Mr. Stone a share of the recovery brought about by his efforts.

## II. THE COURTS BELOW CORRECTLY FOUND THAT MR. STONE IS AN ORIGINAL SOURCE

The district court's findings, as affirmed by the Court of Appeals, that Mr. Stone had direct and independent knowledge of the information on which he based his FCA allegations, and that he disclosed that information to the Government before filing suit, are subject to clear error review. *See Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985) (holding that clearly erroneous standard governing review of factual findings "does not entitle a reviewing court to reverse . . . simply because it is convinced that it would have decided the case differently"); *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, Supreme Court will not 'lightly overturn' the concurrent findings of the two lower courts.") (citation omitted).

### A. Mr. Stone Had Direct and Independent Knowledge of the Information on Which His Allegations Were Based

The gravamen of Mr. Stone's original and amended complaints is that Rockwell knowingly hid ES&H violations in order to continue receiving award fee bonuses from the Government. JA 42-46; 402-15. As the courts below found, Mr. Stone had direct and independent knowledge of these allegations.

*Pondcrete.* The Tenth Circuit held that Mr. Stone had "direct and independent knowledge" of the information upon

which his allegations are based for three reasons: (1) Mr. Stone's duties as a Principal Engineer and, later, Lead Principal Engineer at Rocky Flats included "plant-wide 'troubleshooting' and reviewing designs and existing operations for safety and cost effectiveness," Pet. App. 17-18a; (2) Mr. Stone had personal knowledge of problems with Rockwell's pondcrete manufacturing process, *id.* 18-19a; and (3) Rockwell "forbade [Mr. Stone] from discussing any environmental problems at Rocky Flats with the DOE," *id.* 19a. This knowledge, gained while Mr. Stone worked at Rocky Flats, indisputably pre-dates any public disclosures. There is no basis to overturn these findings.

The Tenth Circuit found that Mr. Stone had communicated his concerns about the pondcrete manufacturing process in an October 13, 1982 Engineering Order. The court found that this document "was explicit in articulating his belief that the proposed design for making pondcrete was flawed: '*This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . .*'" *Id.* 18a (emphasis added by Court of Appeals). Accordingly, the Court of Appeals held:

> Stone's knowledge that *a defective pondcrete manufacturing process* would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information "underlying or supporting" his allegation concerning Rockwell's alleged ultimate fraudulent activity (the submission of claims to the DOE falsely stating that Rocky Flats was in compliance with environmental, health and safety laws).

*Id.* 21a (emphasis added). As the Tenth Circuit observed, "[d]espite [Mr. Stone's] warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." Pet. App. 18a. The Engineering Order, which Mr. Stone wrote and provided long before any public

disclosures about the insolidity of Rockwell's pondcrete blocks, evidences Mr. Stone's direct and independent knowledge that the pondcrete process would not work *and* Rockwell's awareness that the process was flawed.

Mr. Stone's knowledge was further detailed in the affidavit he submitted in response to Rockwell's motion to dismiss and in the confidential disclosure statement he filed in conjunction with his original complaint, in which he explained that "the [pondcrete] piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement, such that the 'pondcrete' blocks would rapidly disintegrate thus creating additional contamination problems." Pet. App. 19a; JA 290. Rockwell ignores this record evidence.

Instead, after conceding the issue below, *see supra* note 5, Rockwell now makes three arguments as to why it believes Mr. Stone did not have *sufficient* knowledge as to pondcrete. Pet. Br. 38-40. Each relies on the erroneous assumption that the touchstone of direct and independent knowledge is the trial evidence, not the allegations in the complaint, and each is meritless.

First, Rockwell argues that it is "implausible" to believe the piping system Mr. Stone reviewed could have caused pondcrete blocks to be insolid because human operators supervised the pondcrete manufacturing process. Pet. Br. 39. The Tenth Circuit correctly rejected this argument. Pet. App. 22a.

There simply is no basis in the record to say – and certainly no factfinder below has found – that the presence of human operators at Rocky Flats made deficiencies identified by Mr. Stone in the pondcrete manufacturing process implausible. In the pretrial order, plaintiffs asserted that "the pondcrete manufacturing equipment often was malfunctioning in a way that substantially impeded Rockwell's ability to produce an acceptable waste form" and that insolid pondcrete was caused

by an "incorrect cement/sludge ratio . . . as well as due to inadequate process controls and inadequate inspection procedures." JA 469-70. Neither plaintiffs nor defendants presented expert testimony at trial that purported to explain the cause or causes of the pondcrete insolidity. And that was not plaintiffs' trial burden on their FCA claim: the burden on plaintiffs, rather, was to prove that Rockwell knew that its manufacturing process would result in insolid pondcrete blocks and that Rockwell concealed that knowledge from the Government in order to continue receiving award fees. Plaintiffs met that burden, and Rockwell's appellate attempt to divine what the jury concluded as to the cause(s) of pondcrete insolidity must be rejected.

Rockwell's second argument, that Mr. Stone's piping theory was "proved wrong" at trial, Pet. Br. 39, is likewise without merit, even if relevant. None of the evidence adduced at trial demonstrating that some of the Rocky Flats foremen produced "concrete hard" pondcrete while others produced insolid pondcrete undermines the manufacturing deficiencies identified by Mr. Stone. Tr. 5177.[28] Mr. Stone knew that the

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[28] *See, e.g.*, Rockwell's Unusual Occurrence Report describing the failure of pondcrete blocks in 1988:

> The incorrect cement/sludge ratios in the pondcrete resulted from inadequate process control of varying solids concentrations in the sludge feed to the pug mill (where cement and sludge are mixed). Also a partially plugged star valve used to introduce cement to the mixer contributed to the incorrect ratio. . . . Operations in the Pondcrete processing area were discontinued pending investigation into the cause(s) of the occurrence and determination of corrective actions.

CA App. 1825-26.

process by which Rockwell intended to extract the sludge from the ponds was defective and would result in too much liquid. Rockwell's suggestion that this flaw has no relationship to inadequate cement and the subsequent leaching pondcrete is both illogical and wrong. Indeed, Mr. Fryback, one of the pondcrete foremen cited by Rockwell, Pet. Br. 40, made clear in his testimony that there were a number of potential causes for insolid pondcrete, including manufacturing defects. Tr. 990-92, 1037-38.[29]

Finally, Rockwell argues that Mr. Stone's criticism of the pondcrete manufacturing process does not establish Mr. Stone's direct and independent knowledge because "differences in engineering judgments" cannot be the basis for an FCA claim. Pet. Br. 40. This misses the point. Mr. Stone did not allege or seek to prove that Rockwell's process for creating pondcrete itself was fraudulent. Rather, plaintiffs proved at trial that Rockwell knew about problems with its pondcrete manufacturing process but hid them from the Government in order to obtain lucrative award fees. This is what the FCA requires, and this is what the jury found. No more is required for original source purposes. *See, e.g., Wang*, 975 F.2d at 1417 (holding that relator's assessment of

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[29] Rockwell places great emphasis on the trial testimony of pondcrete foremen Fryback, Tallman and Teel and plaintiffs' closing argument regarding pondcrete production. Pet. Br. 12, 40. The significance of such testimony was not solely the particular cement/sludge ratio but that Rockwell employees *concealed* leaking boxes from the Government. Tr. 1647-58, 1671-76, 4891-94, 4896-903.

engineering problems in the course of his employment satisfied the direct and independent knowledge requirement).[30]

*Spray Irrigation.* As Rockwell also conceded below, *supra* note 5, Mr. Stone also had direct and independent knowledge of the information on which his spray irrigation allegations was based, evidenced by, among other things, two documents Mr. Stone wrote while at Rocky Flats. The first document is a December 1, 1980 "Engineering Calculation Sheet" on the subject of "nitrate waste irrigation," which is based on Mr. Stone's observation of the existing spray irrigation system at Rocky Flats. CA App. 430-37; JA 224-25. The second document is a 1984 memorandum to Rockwell, in which Mr. Stone described the spray irrigation process as a "latent time bomb." JA 174, 226-27. These documents demonstrate that Mr. Stone was aware long before any public disclosures that Rockwell was employing a defective spray irrigation process that, if continued, would contaminate the environment. Mr. Stone also alleged that Rockwell engaged in "fraudulent practices" with respect to spray irrigation in his 1986 state court complaint. JA 270. Accordingly, the record

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[30] Rockwell also argues that Mr. Stone's knowledge cannot be "direct" because he no longer was employed at Rockwell when the pondcrete blocks actually slumped on the outdoor pads. As the Tenth Circuit held, that Mr. Stone was not physically present on those pads is "immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete." Pet App. 21a. Mr. Stone knew Rockwell was producing faulty pondcrete and knew that such failure would lead to environmental contamination. Certainly, a defendant cannot fire a whistleblower, continue to engage in the same fraudulent conduct and avoid liability on that basis.

amply demonstrates that Mr. Stone had direct and independent knowledge that Rockwell's spray irrigation practices were defective and were contaminating the environment, and that Rockwell knew this and concealed that fact in order to continue to receive award fees.

Rockwell focuses its entire brief on pondcrete, leaving to a footnote the assertion that "[a]ll spray irrigation allegations corresponded to time periods as to which the jury found for Rockwell. It would do Stone no good to establish original source status as to the spray irrigation theories, as that would merely establish jurisdiction over claims he lost at trial." Pet. Br. 9 n.5 (internal citation omitted). Rockwell is wrong for at least three reasons. *First*, as already noted, the original source provision is determined by reference to the relator's knowledge of the information on which the *allegations* are based; the jury verdict, even if clear (which it is not here), is irrelevant to that question. *Second*, plaintiffs' spray irrigation allegations *did* include the time periods as to which the jury found against Rockwell. *Compare* JA 548-49 (verdict form) *with* JA 410-11 (amended complaint). *Third*, as discussed further below, it is wrong as a matter of law to say that plaintiffs "lost" their spray irrigation claim at trial.

At trial, Mr. Stone and the Government focused on proving that Rockwell made false statements to DOE in order to obtain award fees, regarding a variety of ES&H problems, including pondcrete and spray irrigation. A lengthy period of discovery and subsequent decisions about what evidence to present at trial, some of them made "at the Government's behest for tactical litigation reasons," JA 570, led to a natural narrowing of the claims asserted in the amended complaint. No claim "morphed," as Rockwell asserts. Pet. Br. 28. In the original complaint, amended complaint and pre-trial order, Mr. Stone consistently alleged that Rockwell hid ES&H problems from the Government in order to obtain fees. That is the same theory articulated in Count One of the Amended Complaint, an FCA count that included both spray irrigation

and pondcrete, and that is what Mr. Stone and the Government proved to the jury at trial.

Rockwell next speculates as to what evidence *may* have convinced the jury of Rockwell's liability, but as the Tenth Circuit has observed, parties cannot speculate regarding the factual basis for the jury's findings regarding liability or damages. *See* Pet. App. 31a, *discussing Midwest Underground Storage, Inc.* v. *Porter*, 717 F.2d 493 (10th Cir. 1983). The verdict form split Rockwell's liability into time periods based on the different award fee periods for which Rockwell obtained payments from the Government; it was not organized by theory or claim and does not mention pondcrete or spray irrigation; and damages were not broken down by time period. JA 548-49. Indeed, as noted above, the actual damage figure the jury chose corresponds to the dollar to the fees Rockwell was awarded for its "Waste Management" performance, which encompasses both pondcrete and spray irrigation. Pet. App. 30a. Accordingly, even if the jury verdict were relevant to the original source analysis (and it is not), it would still be the case that if Mr. Stone qualifies with respect to either his pondcrete or spray irrigation allegations (and he does), this Court should affirm.

As shown, Mr. Stone's knowledge of his pondcrete and spray irrigation *allegations* – not trial evidence – easily satisfies the Tenth Circuit's standard (which is faithful to the statute), as well as those standards articulated by other courts of appeals (to the extent they even differ). He satisfies the standard in the D.C. Circuit requiring knowledge of "any essential element of the underlying fraud transaction," *Springfield*, 14 F.3d at 657; the standard in the Third Circuit requiring knowledge of "the most critical element of [the relator's] claims," *Mistick*, 186 F.3d at 388; the standard in the Eighth Circuit requiring knowledge of "the true state of the facts," *Minnesota Ass'n*, 276 F.3d at 1050; the standard in the Ninth Circuit requiring "first-hand knowledge of the alleged fraud," *United States ex rel. Aflatooni* v. *Kitsap Physicians*

*Servs.*, 163 F.3d 516, 525 (9th Cir. 1999); and the standard in the Eleventh Circuit requiring knowledge of "information [that] is potentially specific, direct evidence of fraudulent activity," *Cooper*, 19 F.3d at 568 n.12 (11th Cir. 1994). *See also* Stone Br. in Opp. 19-23.

To the extent any of these standards requires knowledge of fraud, Mr. Stone meets that test too. Mr. Stone knew that Rockwell's award fees were contingent on acceptable ES&H performance and he observed that Rockwell continued to receive fees despite its many ES&H deficiencies. Moreover, Mr. Stone's knowledge of the true state of facts – that Rockwell's plans for pondcrete would not work and that Rockwell's spray irrigation practices were contaminating the environment – were based on his review of Rockwell's pondcrete plans and spray irrigation practices. That Mr. Stone did not know of each individual piece of paper representing a false claim is of no moment, as he knew that the true state of affairs as to Rockwell's environmental performance was not being reported to the Government while Rockwell was continuing to receive lucrative bonuses. *That is knowledge of fraud.* And, significantly, Mr. Stone reported Rockwell's fraud to the Government over the course of a series of meetings between 1986 and 1988 – well before *any* facts became public – and this led to the Government's investigation of Rockwell. Mr. Stone meets any original source test.

As this Court has held, it "cannot undertake to review concurrent findings of fact by two courts below in the absence of *a very obvious and exceptional showing of error.*" *See Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (declining to reconsider the ultimate conclusion reached by the courts below after a three-week trial and review of a lengthy and complex record) (*quoting Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (emphasis added)). No such showing has been made here, and, accordingly, the Court should affirm.

### B. Mr. Stone Provided the Information on Which His Allegations Were Based to the Government Before Filing Suit

Mr. Stone also easily satisfies the second prong of subsection (e)(4)(B), which requires a *qui tam* plaintiff to have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit noted, "the United States did not contend in the district court that Mr. Stone failed to make the necessary disclosures to the government." Pet. App. 51a n.5. Indeed, there can be no question here that Mr. Stone voluntarily provided all of his information to the Government before filing suit.

Rockwell misguidedly argues that Mr. Stone did not provide his information "voluntarily" inasmuch as he also discussed *other* topics and provided *other* documents to the Government. Pet. Br. 45-47. This argument makes no sense. Rockwell reads in the word "voluntary" a "requirement that the relator present the information in a manner designed to inform the Government of the salient facts." *Id.* 45-46. The statute requires no such thing. Indeed, the authorities Rockwell cites relate to "disclosure" requirements, *id.* 47, which have nothing to do with the original source provision; § 3730(e)(4)(B) only requires that the information be "provided." The voluntariness requirement thus merely ensures that the relator has gone to the Government to provide his information of his own free will, and not as the result of a subpoena or other compulsory process, *see United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326, 340 (3d Cir. 2005), or as required by the terms of his employment, *see United States ex rel. Fine* v. *Chevron, U.S.A.*,

*Inc.*, 72 F.3d 740, 745 (9th Cir. 1995). It does not require the relator to emphasize any one item in particular while meeting in confidence with Government agents.[31]

It is undisputed that Mr. Stone first approached the Government in 1986 and that, in March 1988, Mr. Stone provided the FBI with documents related to pondcrete, spray irrigation and the award fee process. JA 180-81, 598, 600, 619-21. Mr. Stone also discussed pondcrete, spray irrigation and the award fee process with the Government in the 1986-88 meetings. *Id.* 181-82, 599-601, 615-21.

In reaching its decision that Mr. Stone is an original source, the Tenth Circuit looked closely at Mr. Stone's 1982 Engineering Order. Noting the district court's finding on remand that this document had been turned over to the FBI in March 1988, the Court of Appeals reaffirmed its earlier decision that the Engineering Order "was explicit in articulating [Mr. Stone's] belief that the proposed design for making pondcrete was flawed," Pet. App. 51a, and thus held that by turning it over to the Government, Mr. Stone had

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[31] Rockwell also argues that the quantity of documents Mr. Stone turned over to the Government was so great that they were in fact unhelpful. Pet. Br. 46-47. This makes no sense. In effect, Rockwell is claiming that Mr. Stone should have provided the Government with *less* information than he did. For its part, the Government has never made such a claim. In truth, Mr. Stone provided the documents he had, and he answered the questions the Government posed to him during their meetings truthfully and honestly. JA 599. He did not "bury" anything. It was impossible for Mr. Stone to know, prior to filing suit, much less prior to discovery and trial, which of the documents he provided would be used to prove his claims to a jury. Nor, as a dismissed employee, could he possibly have had in his possession all of the ultimate trial exhibits.

carried his burden of persuasion with respect to subsection (e)(4)(B)'s requirement that the relator's information be provided voluntarily. *Id.* 52a.

Mr. Stone also discussed his knowledge that Rockwell was improperly disposing of wastes via spray irrigation. JA 181-82, 599-601, 615-21. The December 1, 1980 Engineering Calculation Sheet relating to irrigation system design criteria; the 1984 memoranda in which Mr. Stone warned a Rockwell manager that ground water control "is a latent time bomb"; and the 1986 state court complaint, which discusses the 1980 Engineering Calculation Sheet in conjunction with Mr. Stone's allegations of Rockwell's "fraudulent practices," were all provided by Mr. Stone to the FBI in March 1988. JA 600-01, 606-08, 619-21.[32]

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[32] Mr. Stone and Rockwell are in agreement that the Second and Ninth Circuit standard requiring a would-be original source to be the source *to the public discloser*, *see United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Wang*, 975 F.2d at 1418, should be rejected on the ground that it renders the original source provision essentially superfluous. *See* Pet. Br. 49. But, contrary to Rockwell's contention, if this Court were to adopt the Second and Ninth Circuit approach, Mr. Stone is still an original source because he provided some of the information used by Agent Lipsky to procure the search warrant for Rocky Flats – a point Rockwell concedes. JA 97; Pet. Br. 4. Additionally, in the Sixth and D.C. Circuits, a relator must inform the Government of the alleged fraud before the information has been publicly disclosed, even if the relator is not the source of the public disclosure. *See United States ex rel. McKenzie* v. *Bell South Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997); *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997). This rule finds no support in the text of the statute either. Nevertheless, if this Court were to adopt it, Mr. Stone clearly is still an original source as he disclosed his information to the Government prior to the search warrant and the press coverage that followed.

### C. Should the Court Adopt a Different Standard Than Used By the Courts Below, It Should Remand

There is ample evidence in the record with respect to both aspects of the original source provision to warrant affirmance with respect to pondcrete and spray irrigation. As noted above, this Court should accord deferential weight to the district court's original source findings. *See Anderson*, 470 U.S. at 573; *Cromartie*, 532 U.S. at 242. If, however, the Court disagrees with the standard applied by the Tenth Circuit, Mr. Stone respectfully submits that the Court should remand for a determination under the standard imposed by the Court. *See, e.g., Georgia* v. *Ashcroft*, 539 U.S. 461, 491 (2003) (remanding for reexamination of the facts under new standard Court announced regarding propriety of state legislative redistricting plan); *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992) (remanding to apply new standard for modifying consent decrees); *see also United States* v. *Bestfoods*, 524 U.S. 51, 73-74 (1998) (remanding to permit lower court to make more concrete findings as to contested issue that had not been focused on previously).

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

No. 05-1272

# In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY BRIEF OF PETITIONERS ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

Page(s)

### FEDERAL CASES

*Arbaugh v. Y&H Corp.*,
126 S. Ct. 1235 (2006) ..... 6

*Cargill, Inc. v. Monfort of Colorado, Inc.*,
479 U.S. 104 (1986) ..... 3

*Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) ..... 14

*Corsello v. Lincare, Inc.*,
428 F.3d 1008 (11th Cir. 2005), *cert. denied*,
127 S. Ct. 42 (2006) ..... 13

*DaimlerChrysler Corp. v. Cuno*,
126 S. Ct. 1854 (2006) ..... 9

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993) ..... 15

*DiLeo v. Ernst & Young*,
901 F.2d 624 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990) ..... 13

*Exxon Mobil Corp. v. Allapattah Services*,
125 S. Ct. 2611 (2005) ..... 14

*Garcetti v. Ceballos*,
126 S. Ct. 1951 (2006) ..... 16

*Garcia v. United States*,
469 U.S. 70 (1984) ..... 14

*Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005) ..... 8

*HUD v. Rucker*, 535 U.S. 125 (2002) ..... 14

*Hayes v. Hoffman*, 325 F.3d 982 (8th Cir. 2003) ..... 8

*Keene Corp. v. United States*, 508 U.S. 200 (1993) ..... 8

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ..... 5

*Russell v. Southard*, 53 U.S. 139 (1851) ..... 19

*Saba v. Compagnie Nationale Air France*, 78 F.3d 664 (D.C. Cir. 1996) ..... 16

*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) ..... 10

*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) ..... 4

*United States v. Halper*, 490 U.S. 435 (1989), *overruled on other grounds, Hudson v. United States*, 522 U.S. 93 (1997) ..... 20

*United States v. Ross*, 92 U.S. 281 (1876) ..... 15

*United States ex rel. Federal Recovery Services v. Crescent City E.M.S., Inc.*, 72 F.3d 447 (5th Cir. 1995) ..... 6

*United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) ..... 8

*United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) ..... 14

*United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 14

*United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ..... 8

*Washer v. Bullitt County*, 110 U.S. 558 (1884) ..... 5

*In re Wireless Telegraph Federal Cost Recovery Fees Litigation*, 396 F.3d 922 (8th Cir. 2005), *cert. denied, Stainless Sys. v. Nextel W. Corp.*, 126 S. Ct. 356 (2005) ..... 5

## DOCKETED CASES

*United States ex rel. Meshel v. Tenet Healthcare Corp.*, No. EP-02-CA-0525 (W.D. Tex.) ..... 18

## FEDERAL STATUTES

31 U.S.C. § 3730(a) ..... 7

31 U.S.C. § 3730(b)(1) ..... 7

31 U.S.C. § 3730(b)(2) ..... 3, 9

31 U.S.C. § 3730(b)(4) ..... 9

31 U.S.C. § 3730(c) ..... 9

31 U.S.C. § 3730(d)(1) ..... *Passim*

31 U.S.C. § 3730(d)(2) ..... 14

31 U.S.C. § 3730(e)(4) ..... *Passim*

31 U.S.C. § 3732(b) ..... 9

## OTHER AUTHORITY

Fed. R. Civ. P. 9(b) ..... 5

Fed. R. Civ. P. 11(b)(3) ..... 12, 13

Fed. R. Civ. P. 15(b) ..... 4

Federal Rules of Evidence Rule 404(b) ..... 16

1 John Boese, Civil False Claims and *Qui Tam* Actions § 4.02[E] (3d ed. 2006) ..... 7

22 Charles Wright & Kenneth Graham, Federal Practice & Procedure, § 5239 (1978) ..... 16

## ARGUMENT

James Stone's "direct and independent knowledge," to the extent he has any at all, is so meager that Respondents are compelled to endorse implausible interpretations of the statute. They contend that the "allegations" in the "action" must be identified through exclusive reference to the first complaint, permitting a relator to establish "original source" status by reliance on one theory of fraud and then to prove and recover under a different theory drawn from publicly disclosed sources. They argue that speculative inferences and predictions qualify as "direct ... knowledge." They contend, like the Tenth Circuit, that the statute imposes no requirements at all about the *amount* of "direct and independent knowledge" required, such that even a scintilla of relevant information would suffice. And they suggest that the Government's intervention grants relators an arbitrary windfall by eliminating any subsequent scrutiny of "original source" issues. None of those interpretations are reasonable. Taken together, they would eviscerate the public disclosure bar.

Stone originally alleged false claims "on a massive scale," covering the entire decade of the 1980s and worth over $1 billion. *See* Stone Br. at 2, U.S. Br. at 21, JA 40.[1] In the end, however, the jury found only three misstatements covering a year and a half, worth less than $1.4 million. JA 549. Yet Stone had no knowledge at all about any of the facts offered to prove the one theory of fraud presented to and accepted by the jury. Respondents try to deflect attention from that glaring gap by describing both Stone's knowledge and his allegations at an implausibly high level of generality—*e.g.*, "Rockwell hid ES&H problems from the Government in order to obtain fees." Stone Br. at 44. But Respondents'

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[1] "Pet. Br." refers to Petitioner's Merits Brief. "Stone Br." refers to Stone's Merits Brief. "U.S. Br." refers to the United States' Merits Brief. "Pet. App." refers to Petitioner's appendix to its Petition for Certiorari. "Pet. Reply" refers to Petitioner's Reply to Respondents' Opposition to Petition for Certiorari. "CA App." refers to Rockwell's appendix filed in the Court of Appeals. "Tr." refers to the trial transcript.

own Statement of Claims, which by the terms of the district court's Pretrial Order superseded all prior pleadings, described the one "ES&H problem" underlying the false statements actually alleged and proved at trial this way: "[d]uring the winter of 1986, Rockwell replaced its then pondcrete foreman, Norman Fryback, with Ron Teel. Teel increased pondcrete production rates in part by, among other things, reducing the amount of cement added to the blocks. ... [T]his reduced cement-to-sludge ratio was a major contributor to the existence of insufficiently solid pondcrete blocks on the storage pads." JA 476–77. Stone knew nothing about Teel's decision to reduce the cement ratio, or about any statements to the Government about the resulting pondcrete. All these events occurred long after he left Rocky Flats and moved to New Jersey. Like everyone else, Stone could easily have read these allegations in the newspaper before filing his case. Pet. Br. at 4–5.

1. Stone argues that a relator's original source status should be evaluated only once, on the basis of the original complaint. But as even the Government concedes, if the relator's "theory of liability changes substantially along the way," there simply must be "some requirement that the ultimate theory have some relationship to the original theory that satisfied the 'original source' test." U.S. Br. at 40. Otherwise parasitic relators could easily evade the original source bar by pleading a theory of fraud about which they could claim "direct and independent knowledge," and then actually pursue allegations based on publicly disclosed information. Indeed, that is precisely what Stone is trying to do here. The non-specific allegations in Stone's original complaint may have been broad enough to encompass some now-abandoned claim of fraud based on his direct and independent knowledge.[2] Well before trial,

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[2] Despite Respondents' misleading insistence that "Stone's claims [always] included pondcrete," Stone Br. at 26 n.21; *see also* U.S. Br. at 43, pondcrete is never mentioned in Stone's original complaint. *See* JA 38–49. That complaint was so generic that, under the analysis Respondents now proffer, it could retrospectively be read to cover virtually *any* ES&H

however, Stone and the Government were required to make those vague allegations specific. Stone's firsthand knowledge is irrelevant to, and indeed actively inconsistent with, those clarified allegations—which were drawn straight from the public disclosures. Respondents argue, in effect, that Stone is an original source of different allegations they *might have* pursued. But that does not make him an original source of the allegations on which *this* action is based.[3]

a. First, Respondents suggest that the word "allegations" refers only to the allegations of the original complaint. But § (e)(4) never uses the word "complaint"—it refers exclusively to allegations and information in the "action." *See* § 3730(e)(4)(A), (B) ("action ... based upon the public disclosure of allegations" and "action ... based on the information"). "Action" is not a synonym for "complaint." Under § 3730(b)(2), for example, the Government may intervene in the "action" after it receives "the complaint." And "allegations" are not found only in complaints. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113–14 (1986) ("allegations" found in pre-trial order).

While the original complaint may be the first articulation of the "allegations" upon which an "action" is "based," it is hardly the last word. After the Government intervened, Plaintiffs jointly filed an Amended Complaint. Pet. App. 8a. And even the Amended Complaint was not the operative pleading by the time this case went to the jury. Before trial, the district court advised that it would issue a "final pretrial order *which will ... supersede all the pleadings*." CA App. 1635 (emphasis added). All prior "pleadings [were] deemed merged" into the Pretrial Order, which then "control[led] the subsequent course of this *action*." CA App. 1072 (emphasis added). Attached to and referenced in the

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violation the grand jury eventually charged.

[3] Stone wrongly asserts (at 38) that the Tenth Circuit's conclusion that he is an original source is reviewed only for clear error. This case is about whether the information Stone claims "direct and independent knowledge" of is "the information on which the allegations are based" under § (e)(4)(B)—a question of statutory construction reviewed *de novo*.

Pretrial Order was "[a] description of the plaintiffs' claims," written by Respondents themselves, containing pondcrete allegations tracking the public disclosures rather than the different (and inconsistent) theory of pondcrete failure about which Stone claims personal knowledge. CA App. 1064. Independently, the significant divergence between the original pleadings and the allegations actually presented to the jury would have effected a constructive amendment of the pleadings. *See* Fed. R. Civ. P. 15(b).

Stone protests that Rockwell's interpretation would require "the relator [to] have direct and independent knowledge of *the particular evidence introduced at trial*." Stone Br. at 16–17. Rockwell has never suggested a relator must know all the evidence, but nothing in the statutory text renders the proof at trial irrelevant to the inquiry. To the contrary, the FCA elsewhere uses the word "information" in precisely this way. As Stone concedes, § 3730(d)(1) clearly contemplates a direct comparison of the trial evidence and the relator's personal knowledge when evaluating whether the action is "based primarily on disclosures of specific *information* (other than information provided by the person bringing the action)." Stone Br. at 32–33. Perhaps the allegations of a relator's action could, in theory, be "based" on his "direct and independent knowledge" even if none of his original source knowledge or evidence is introduced at trial. But the absence of any overlap is, at a minimum, a powerful indication that his original source knowledge is not the actual basis of the allegations in the action, or that his personal knowledge is trivial or tangential to those allegations. Both are true here.

b. Second, Stone argues that jurisdiction depends "upon the facts as they existed at the time the complaint was filed." Stone Br. at 27–28 & n.23. That misses the point—it is not Stone's knowledge that changed but rather his *allegations*, and/or their "bas[is]." A change in allegations or legal theory can of course affect jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966), for example, this Court held that the propriety of pendent

jurisdiction over state law claims "remains open throughout the litigation," and that if the allegations later evolve to make clear that "a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."[4] Jurisdiction must be established at all stages of a litigation, and if a factual allegation necessary to jurisdiction is proven untrue, then jurisdiction is destroyed. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The same must be true if jurisdictional allegations are withdrawn, modified, or clarified in a way that would no longer support jurisdiction.

Of course it is ordinarily preferable for jurisdiction to be determined at the outset. But Respondents' proposed rule would incentivize relators to obscure the true basis and nature of their allegations at the outset, or to plead with such generality that meaningful scrutiny of the relationship between those allegations and the relator's "direct and independent knowledge" is impossible. The Government ups the ante by arguing that Fed. R. Civ. P. 9(b) should be completely toothless in FCA cases. *See* U.S. Br. at 28 n.12; *see also id.* at 27 n.11. It then reasons that if (as here) the first complaint is hopelessly vague and general then there is no requirement that the relator's knowledge be related in any direct or specific way to the theory of fraud actually presented to the jury. *Id.* at 24-25. It is enough, apparently, that both involved "ES&H violations." Proceeding at this level of generality would qualify Stone as an "original source" for almost *any* case against Rockwell, forever.

Stone's alternative argument that § 3730(e)(4) is not

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[4] Similarly, in *Washer v. Bullitt County*, plaintiffs' initial complaint had sought relief below the required amount in controversy. 110 U.S. 558, 561 (1884). This Court held that "[w]hen a petition is amended ... the cause proceeds on the amended petition ... [and] jurisdiction will be maintained without regard to the original petition." *Id.* at 562; *see also In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928–29 (8th Cir. 2005) ("It is well-established that an amended complaint supersedes an original complaint" for purposes of "resolv[ing] questions of subject matter jurisdiction"), *cert. denied, Stainless Sys. v. Nextel W. Corp.*, 126 S. Ct. 356 (2005); *see also* Pet. Br. at 29 & cases cited therein.

jurisdictional at all bears little discussion.[5] Because § 3730(e)(4) was written in jurisdictional terms, "courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006). Moreover, because Stone's Article III standing depends upon an assignment of the Government's claim, failure to satisfy § (e)(4) withdraws that assignment and eliminates his standing. Pet. Br. at 24 n.12.[6]

c. The Government argues that while intervention does not "moot[] any *pre-existing* defects in Stone's initial *qui tam* complaint," it moots defects arising from amendments to the pleadings occurring after the Government intervenes. U.S. Br. at 40–41. This argument fails for two reasons.

First, the Government's argument rests upon the proposition that § (e)(4)(A) does not bar actions "brought by the Attorney General." *See* U.S. Br. at 41; *see also* Stone Br. at 19. But the mere act of intervention does not transform a claim initially brought by a relator into one "brought by the Attorney General." Section 3730 authorizes three different kinds of actions: (1) an action brought by the Attorney General under § 3730(a); (2) an action brought by a relator that the Government elects to "proceed with" under § 3730(b)(4)(A); and (3) an action brought by a relator that the Government does not "proceed with" under § 3730(b)(4)(B). Respondents conflate the first and second types of proceedings, but the statute clearly differentiates them. The statute describes intervention with the words

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[5] Stone claims he can receive fees without being an original source. Stone Br. at 33 n.25. But he concedes that he must be an original source to receive a share of any award, *id.* at 33, and the statute does not authorize fees for a relator who cannot share in the award. *See also United States ex rel. Fed. Recovery Servs. v. Crescent City E.M.S., Inc.*, 72 F.3d 447, 453–54 (5th Cir. 1995) (same).

[6] Stone repeatedly mentions that Rockwell did not renew its original source motion until after trial. Stone Br. at 9–10 & n.10. Of course, jurisdictional defects may be raised at any time. Both the district court and Stone also concluded that Stone's original source status should be considered only after trial. *See* JA 428; CA App. 1058. The parties jointly agreed "to defer this matter until after trial." CA App. 1056.

"the Government proceeds with the action," and Section (d)(1) even speaks of the "Government proceed[ing] with an action brought by a person under subsection (b)." The statute gives relators authority to bring claims on behalf of themselves and the United States, but does *not* give the Attorney General authority to bring claims on behalf of the United States *and a relator*. *Compare* § 3730(b)(1) ("A person may bring a civil action ... for the person and for the United States.") *with* § 3730(a). It is only once the relator is ousted under § 3730(e)(4) that a claim becomes one "brought by the Attorney General"—because at that point, the claim fits within the authority conferred upon the Attorney General by § 3730(a). Indeed, if this claim has become one "brought by the Attorney General," then Stone can receive no award whatsoever, because § 3730(a) does not provide for a relator share, nor for fee shifting. To Petitioner's knowledge, every court to consider the issue since the 1986 amendments has held that Government intervention does not protect a relator against dismissal under § 3730(e)(4)—and none has differentiated between original source defects arising before intervention and those arising after.[7]

Second, even if Stone's vague original complaint can be read to encompass a pondcrete claim, Stone *never* had direct and independent knowledge that any leaking pondcrete was actually present at Rocky Flats in violation of RCRA, nor that any such pondcrete was concealed from DOE. *See* Pet. Br. at 38–43; *infra* Part 4. And his voluntary production was insufficient before the Government intervened. *See* Pet. Br. at 43–49; *infra* Part 5. Stone's original source problem, thus, is not moot under the Government's own analysis.

d. Finally, the Government argues that the "narrowing" of allegations that occurred here should be ignored, lest a

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[7] *See, e.g.*, 1 John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.02[E] (3d ed. 2006) (collecting cases); Reply Brief for the United States at 13, *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (Nos. 98-1497, 98-1498, 98-1499) (noting that this argument "has been rejected by every court to consider the issue under the 1986 amendments").

wedge be driven between the Government and relators over trial strategy. U.S. Br. at 42–44. But "[t]he FCA grants the *qui tam* relator no role whatever in formulating the government's *own* litigation strategy." Brief for the United States in Opposition at 23, 22. Relators need not be encouraged to "acquiesc[e]" when the Government seeks to amend or narrow its allegations. U.S. Br. at 44. If a change in trial strategy eliminates those allegations for which a relator would have been an original source, then the relator is no longer necessary or entitled to a share under the plain language. The Government clearly believes that Stone and his lawyers were helpful, and deserve a share. But that policy argument, "whatever its ... merits, is better directed to Congress than to the Court." Stone Br. at 25.

2. Implicit in Stone's brief is the assumption that § (e)(4) is applied in gross—such that if Stone was an original source as to any of his claims (even the spray irrigation claim he lost), jurisdiction is established. Stone Br. at 43–44. Every court to consider this question has held that § 3730(e)(4) must be applied on a claim-by-claim basis. *See United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000); *Hayes v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1415–16 (9th Cir. 1992); *see also* Pet. Br. at 27 n.14. In *Merena* the Government agreed, arguing that the language of the Act "mandate[s] that relators' allegations be analyzed for all purposes on a claim-by-claim basis." Brief for the United States at 24, *Merena*, 205 F.3d 97 (Nos. 98-1497, 98-1498, 98-1499) (capitalization altered). Here the Government recognizes that § (d)(1), which also uses the word "action" rather than "claim," must be applied "on a claim-by-claim basis." U.S. Br. at 42. In *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 417–21 (2005), this Court applied different statutes of limitations to different claims in a *qui tam* action, even though § 3730(b) defines a single statute of limitations for "[a] civil *action* under section 3730." *See also Keene Corp. v. United States*, 508 U.S. 200, 210 (1993)

(holding that "cause of action" in 28 U.S.C. § 1500 is synonymous with "claim"). And this Court recently reiterated that "standing is not dispensed in gross," but rather on a claim-by-claim basis. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1868 (2006). Jurisdiction under § 3730(e)(4), which directly controls a relator's standing, *see* Pet. Br. at 24 n.12, should be treated no differently.[8]

Under the required claim-by-claim analysis, Stone has *never* been an original source as to his pondcrete allegations and thus should have been ousted with respect to that claim long before the Government intervened. Notably, in its brief the Government stops well short of ever asserting that Stone qualifies as an original source of the information on which the pondcrete allegations, specifically, are based.

A claim-by-claim analysis also reveals that Stone's spray irrigation allegations, which were rejected by the jury, cannot create jurisdiction over the pondcrete allegations. Stone says his spray irrigation allegations "*did* include the time periods as to which the jury found against Rockwell," citing the Amended Complaint. Stone Br. at 44. But the Statement of Claims narrowed the spray irrigation allegations down to a single "false claim with respect to spray irrigation consist[ing] of Rockwell's request for and receipt of the Cost-Plus Award Fee ("CPAF") for the six-month period encompassing the month of January 1987 (October 1, 1986 through March 31, 1987)." JA 492. And in closing argument, he specifically told the jury that the spray irrigation claim was "limited to" the "award fee period of

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[8] The remainder of the statute supports that reading. Sections 3730(b)(2) & (4) speak of the Government intervening in "the *action*." Yet the Government properly insists it must be free to intervene on a claim-by-claim basis, lest it "either ... violat[e] Rule 11 by pursuing unsupported claims, or violat[e] its duties to the taxpayers." Reply Br. for U.S. at 26 n.11, *Merena*, , 205 F.3d 97 (Nos. 98-1497, 98-1498, 98-1499). Similarly, the fact that § 3730(c)(2)(A–B) speaks of dismissing or settling "the action" does not mean the Government cannot dismiss or settle specific claims. *Id.* at 27. And § 3732(b)'s grant of pendent jurisdiction over "[c]laims under state law" uses the term "action" interchangeably to define the state claims that can be joined with the federal claims.

October 1, 1986 through March 30, 1987." (Tr. 5072–73.) The jury found no liability for *that* period. JA 548. Moreover, at the Tenth Circuit, Rockwell argued that Stone's "spray irrigation [claim] involved but one of plaintiffs' ten alleged false claims for payment, and resulted in a jury verdict for Rockwell." Appellant's Opening Brief at 15 n.4, *United States ex rel. Stone v. Rockwell Int'l Corp.*, 287 F.3d 787 (10th Cir. 2002). Stone did not disagree—instead, he affirmatively told the Tenth Circuit that the jury found Rockwell liable "with respect to its pondcrete operations." Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 3, 22. The Tenth Circuit agreed, holding that spray irrigation issues are "moot because the verdict for the time frame including this claim was in [Rockwell's] favor." Pet. App. 50a & n.3.

3. Stone rejects *any* minimum threshold requirement as to the "significance or quantum of information an original source must possess," on the ground that Congress did not expressly articulate the standard to be applied. Stone Br. at 30, 35. He endorses the Tenth Circuit's holding that a scintilla of information that "'underl[ies] or support[s]' the fraud allegations [of his] complaint" suffices, *id.* at 21 (quoting Pet. App. 21a), even if that information is not evidence of fraud, *id.* at 24 n.20. The Government also contends that § 3730(e)(4) imposes no requirements as to the *amount or quality* of the relator's information beyond those in Federal Rules. And both Respondents contend that a relator need not have direct and independent knowledge of any actual claims to the government, but only of the "true state of affairs" or "the facts on the ground ... that show the defendant's claims to be knowingly false." U.S. Br. at 31.

As Rockwell explained in its opening brief (at 32–37), those interpretations are inconsistent with Congress's use of the phrase "*the* information on which the allegations are based" and with this Court's holding in *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993), that the "basis" of an action is "those elements ... that, if proven, would entitle a plaintiff to relief under his theory of the case." The most reasonable

interpretation of the statutory language is that an allegation of fraud is "based upon" information that would allow a reasonable person to conclude, in the absence of any contrary evidence, that fraud has occurred. That is just another way of saying that a proper relator should have enough "direct and independent knowledge" of his own to allow a reasonable person to come to the conclusion that a particular fraud has been committed—hardly an unreasonable burden. Respondents' suggestion that any information "underlying or supporting" the allegations can be "the information on which the allegations are based" is contrary to the text and would permit any disgruntled employee or competitor to qualify on the basis of mere background information. Both Stone and the Government betray their unease with their own argument by describing appropriate relators as "people who observe the fraud" or "individual[s] knowing of ... fraud," Stone Br. at 37, or who "possess[] firsthand knowledge of substantial information about the core of the defendant's fraud—the facts on the ground concerning the defendant's actual course of conduct that *show* the defendant's claims to be knowingly false," U.S. Br. at 31 (emphasis added); *see also id.* at 20 ("firsthand knowledge of substantial information showing that the defendant's claims for government funds or property are knowingly false"); *id.* at 35 ("information concerning the facts that show those claims to be knowingly false"). All of those formulations require direct and independent *knowledge of the fraud* in some meaningful sense.

Respondents suggest that relators need not have knowledge of fraudulent claims for payment, but only of "the true state of affairs that renders the defendant's representations to the government knowingly false." *Id.* at 33–34. That parsing of the allegations necessary to establish fraud is arbitrary and atextual, as the Government essentially admits. *Id.* at 32. As a policy matter perhaps the claims will usually be "innocuous" while the true state of affairs will represent valuable information worth paying for, *id.* at 34, but sometimes the opposite will be true. Here, for

example, many persons who read the Denver papers recounting the pondcrete spill would know that Rockwell likely violated the environmental laws. The Government did not need Stone to tell them that even if he had known about it (which he did not). The Government's policy reasoning accordingly argues for a more flexible standard requiring the relator to have "direct and independent knowledge" of whatever element or elements are judged to be "core" or "essential" to uncovering the fraud on the particular facts of the case. Sometimes "the core of the fraud," *id.* at 35, that the Government needs to make its case will be the true facts, sometimes the statement, and sometimes (often) scienter. Of course, Stone supplied nothing essential to *any* of the constituent allegations making up a fraud claim.

The Government also argues that any requirements about the *amount* of evidence a relator must possess "are imposed by provisions of law *other than* 31 U.S.C. § 3730(e)(4)," such as Federal Rules 8, 9, 11, and 56. That misunderstands the different purposes served by the Rules and by § 3730(e)(4). Rule 11 merely requires an attorney submitting a pleading to certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). A relator could satisfy that test with publicly disclosed information or even just the hope of obtaining evidence of fraud through discovery. Rule 11 thus cannot substitute for real scrutiny of a relator's "direct and independent knowledge." The purpose of the public disclosure bar is to exclude parasitic relators, not frivolous claims. The Government's alternative argument that § 3730(e)(4) and Rule 11 converge here "because the allegations in Stone's original complaint were based solely on information that he acquired in his capacity as a Rockwell employee," U.S. Br. at 29 & n.13, is plainly incorrect. Though his vague original complaint leaves the basis of his allegations unclear, Stone soon relied extensively on the publicly disclosed information

in his filings with the district court. *See* JA 88–90.

It also would not be appropriate to look to Rule 11 as a model when articulating the standard for how much "direct and independent knowledge" a relator must have to satisfy § 3730(e)(4). Rule 11 focuses on what a litigant knows *or might find*, and is very lenient, consistent with the liberal pleading and discovery policies of the Federal Rules. Section 3730(e)(4) is a jurisdictional bar designed to screen out relators whose personal knowledge is insufficient. (Although it bears noting that even a Rule 11 analogy would not permit Stone to proceed after discovery with only a scintilla of direct knowledge that is plainly insufficient to sustain his allegations). And if Rule 11 is somehow imported into the meaning of "direct and independent knowledge" in § 3730(e)(4), then Rule 9(b) should be as well—which would require a relator to show that he has direct and independent knowledge of information that supports the "who, what, when, where, and how" of the fraud. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990). Stone's knowledge comes nowhere close. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 42 (2006).

Stone points to § (d)(1) as evidence that Congress intended for the "significance and amount of information possessed by a relator" to be "dealt with flexibly at the award stage." Stone Br. at 35. That section places a ten-percent cap on a relator's bounty where "the court finds" the action "to be based primarily on disclosures of specific information (other than the information provided by the person bringing the action)." It reflects Congress's sensible judgment that an original source relator who contributes little to the ultimate proof should receive a smaller reward. There is nothing inconsistent about a rule that a relator must have, to use the Government's formulation, "firsthand knowledge of *substantial* information showing that the defendant's claims for government funds or property are knowingly false," U.S. Br. at 20 (emphasis added), to qualify as an original source at all, but will be capped at 10% if that

substantial information is not the "prima[ry]" basis of the action. And Stone overlooks the fact that the "flexib[ility]" afforded by § (d)(1) is available only if the Government intervenes. Absent intervention, under § (d)(2) an original source relator is entitled to "not less than 25 percent and not more than 30 percent of the proceeds of the action," regardless of how much or how little information he contributed. A sensible interpretation of the original source requirement itself therefore remains essential to preventing *qui tam* suits that are in substance parasitic, although the relator claims some trivial scrap of personal knowledge "underlying or supporting" his allegations.

Stone's reliance on legislative history is a classic "exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2626 (2005) (citation and quotation marks omitted). Anyone could find a friend in this history. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (the 1986 amendments "underwent substantial revisions" leaving "support somewhere for almost any construction of the many ambiguous terms in the final version"). And floor statements, such as Stone invokes, are the least reliable.[9] As a number of courts have noted, Rep. Berman's statement is even less reliable than usual because it appears to have been drafted *before* an amendment that substantially changed the statute.[10] In any event it does not contradict Rockwell's interpretation; it simply explains that the relator is entitled to a reduced share when another person discloses

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[9] *See Garcia v. United States*, 469 U.S. 70, 78 (1984) ("Isolated statements ... are 'not impressive legislative history.'") (citation omitted). "[E]ven the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

[10] *Stinson*, 944 F.2d at 1167 (Scirica, J., dissenting); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1354 n.13 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *cf. HUD v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (rejecting history commenting on an unenacted version of a bill).

the information to the Government or the media first.

4. Stone can only qualify as an original source of the pondcrete claim (measured at any stage of the case) based on multiple inferential leaps. He must infer (from his alleged observation of ES&H violations, Rockwell's receipt of payments, and the instruction that he not depart from the chain of command) that Rockwell concealed ES&H problems while he worked at Rocky Flats. He must further infer that such concealment *continued after he left*. And he must infer that there would, in fact, be a problem with the pondcrete several years later for Rockwell to conceal. In ordinary parlance the phrase "direct ... knowledge" may embrace some reasonable inferences from personal observation, but it is not consistent with rank speculation. As this Court explained in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993), "the word 'knowledge' connotes more than subjective belief or unsupported speculation." And this Court has long cautioned against "piling inference upon inference." *United States v. Ross*, 92 U.S. 281, 283–84 (1876). Stone's multiple inferences are a bridge too far.

a. Stone claims to have inferred that Rockwell was concealing ES&H problems because he "knew that Rockwell's award fees were contingent on acceptable ES&H performance and he observed that Rockwell continued to receive fees despite its many ES&H deficiencies." Stone Br. at 46. But as Stone himself concedes, ES&H is but *one of many* factors upon which Rockwell was graded. *Id.* at 11 n.11, 45; JA 249 (full list of factors). Stone cannot have known whether the fees Rockwell received had been docked to reflect "ES&H deficiencies." Nor could he have known how the "ES&H deficiencies" he claims to have observed weighed against the rest of Rockwell's environmental performance. And many of the ES&H problems that Stone claims to have observed (including the critical pondcrete piping design issue supposedly reflected in the Engineering Order) were in the nature of engineering disagreements with his coworkers. Stone could not reasonably infer that his bosses were submitting claims for reimbursement that

were knowingly false from the fact that he disagreed with their engineering or scientific judgment. Pet. Br. 40–41.

The fact that Stone was instructed to follow the chain of command does not bolster his flimsy inference. Just last Term, this Court recognized that employers have a legitimate interest in requiring their employees to observe the chain of command, in order to ensure that "official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). Stone's inference that William Nichols's instruction must reflect an illicit intent to hide the truth from DOE is inconsistent with *Garcetti*. And Nichols had nothing to do with the pondcrete or any related claims for payment six years later. His knowledge and intent was therefore legally immaterial. *See Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 & n.6 (D.C. Cir. 1996) (rejecting concept of collective corporate intent).

b. It is undisputed that Stone's own knowledge was based exclusively on his observations "of Rockwell's ES&H practices while he was employed at Rocky Flats." Stone Br. at 20 n.17. His second inference (that because Rockwell allegedly concealed ES&H problems during his employment, it must have concealed different ES&H problems arising years later) is not just wildly speculative but specifically forbidden by the Federal Rules of Evidence. Rule 404(b) prohibits an inference from prior bad acts to "action in conformity therewith" because "evidence of other crimes, wrongs, or acts ... is irrelevant ... the doing of one act is in itself no evidence that the same or a like act was again done by the same person." 22 Charles Wright & Kenneth Graham, Federal Practice and Procedure § 5239 (1978). Without the forbidden propensity inference, Stone had *no* knowledge whatsoever about ES&H violations or their concealment during the relevant time period.

c. Stone's third critical inference—his prediction that piping defects reflected in the 1982 Engineering Order would cause the pondcrete to become insolid years later—is

equally deficient.[11] As a matter of law, a prediction of future manufacturing problems cannot establish direct knowledge of an ES&H violation, let alone a false claim. Stone could only have "direct and independent knowledge" that Rockwell violated RCRA if he knew that Rockwell was subject to RCRA, that the pondcrete was actually too liquid, that Rockwell did not promptly remedy the defect, and that it began leaking while stored on site. *See* JA 467–69 (RCRA violation required improper storage without immediate remedial action); 475 (storage began in October 1986). Every one of these events occurred long after his departure from Rocky Flats, Pet. Br. at 40–41; Pet. App. 46–47a, and a speculative prediction cannot substitute for "direct and independent *knowledge*."

Stone's prediction also cannot have been the information on which the allegations in this case were based, because it was actually disproven by Respondents' own evidence and argument. Pet. Br. 38–41. Stone now insists that the human operators were irrelevant, and that the piping system he critiqued caused the pondcrete to be insolid. If that were true, Stone would be able to explain how Fryback could produce "concrete hard" blocks of pondcrete *using the very machinery Stone now says was defective.* Tr. 5177. Stone offers no explanation—instead he simply announces that this incongruity does not "undermine[] the manufacturing deficiencies identified by Mr. Stone." Stone Br. at 41. But Fryback used the very equipment Stone predicted would be deficient, and it produced "concrete hard" pondcrete that the Government held up to the jury as an example of exactly how the process was supposed to work. Tr. 5177. Stone says that foreman Fryback also identified "manufacturing defects," implying that the trial evidence supported Stone's theory. But Fryback simply testified that the "star valve," which regulated the flow of *cement* (not sludge), and the paddles inside the pug mill required preventive maintenance

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[11] Stone's insistence that Rockwell conceded his original source status, Stone Br. at 7 n.5, 40, is answered at Pet. Reply at 7–8 & n.6.

lest cement build up block the flow of dry cement into the pug mill. Tr. 991–93, 1037–38. This Court will search in vain for any reference to star valves or pug mill paddles in Stone's 1982 Engineering Order. What Stone critiqued was the system for extracting sludge from the ponds.[12] But what his own attorney told the jury was "they were making it wrong, *they weren't using enough cement*, and they were hiding it from the government." JA 546 (emphasis added).

5. Because Stone's 1982 Engineering Order did not identify any of the supposed inferences and predictions on which he now relies, giving it to the Government did not satisfy his voluntary production burden under § (e)(4)(B). In the Government's own words, "unless the information [voluntarily provided] is sufficient to put the Government on the trail of the fraud, the disclosure to the Government is meaningless." United States' Statement of Interest at 9, *United States ex rel. Meshel v. Tenet Healthcare Corp.*, No. EP-02-CA-0525 (W.D. Tex.). The Government now argues that that the disclosures need only "reflect[] substantially all the relevant information that Stone possessed." U.S. Br. at 46. But that misses the point. As its own brief makes clear, Stone relies on an elaborate chain of inference and prediction to qualify as an original source. *Id.* at 23. If those inferences and predictions are the information that "Stone possessed" and relies on to satisfy § 3730(e)(4), then they must also be part of "the information" voluntarily provided.

The affidavits Stone cites to claim that he "discussed pondcrete ... with the Government in the 1986-88 meetings," Stone Br. at 48, are not part of the record. On remand,

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[12] Similarly, the 1988 Unusual Occurrence Report cited by Stone also does not refer to the system he critiqued. Stone Br. at 41 n.28. The "inadequate process control" the UOR describes, CA App. 1825, is the very human oversight Stone now claims was irrelevant. And "the sludge feed to the pug mill," *id.*, is not a reference to the system Stone critiqued (in Stone's own words, the "piping system" that was "intended to be used for removing sludge from the[] ponds," JA 289) but rather to the stage *after* extraction—the "Thickener Tank" in which solids and liquids were separated before solids were passed to the pug mill. CA App. 1831–32.

Stone advised the district court that it could "make the requisite findings on the basis of the present record." JA 585; *see also* JA 588–89; Pet. App. 50a, 70a. When the district court ruled against him, Stone reversed course and moved to add new affidavits (purporting to describe, for the first time, conversations that occurred 15 years earlier). *See* JA 591–603, 614–23; Pet. App. 69a. Unsurprisingly, the district court denied Stone's motion, finding that to accept the affidavits "would be inconsistent with what was stipulated to be the record to be used for the decision in this case" and "would obviously prejudice the defendants." JA 625. Stone does not even argue that the district court abused its discretion,[13] but now cites these very affidavits. *See* Stone's Br. at 48 (citing JA 598, 600, 619–21, 181–82, 599–601, 615–21).[14] This Court has held for over a century that it "must affirm or reverse upon the case as it appears in the record." *Russell v. Southard*, 53 U.S. 139, 159 (1851). Moreover, the district court was right to find that Stone did not discuss his pondcrete theory with the FBI. The record demonstrates that pondcrete was manufactured at Rocky Flats Building No. 788, and stored on outdoor pads Nos. 750 and 904. *See, e.g.*, JA 54–55. The 302 reports reflect that Stone "recapped the building numbers ... of pertinent ... buildings." JA 258. Stone's list did not include Building 788.

Under Stone's reading, a person could satisfy § (e)(4)(B) by hoarding as many documents as possible and dumping them in the Government's lap—without any explanation—so long as at least one piece of paper ultimately proves marginally relevant with 20/20 hindsight *after* trial. Congress intended to reward relators who provide useful information about fraud and help limit the Government's

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[13] Stone suggests the district court misled him into thinking no adverse inference would be drawn from the FBI 302 reports. *See* Stone Br. at 13 n.13. The district court found as a fact "that the court did not mislead Mr. Stone or his counsel." JA 625.

[14] Stone also cites JA 180–81. This citation is to his original affidavit filed in 1993. As the district court found (Pet. App. 71–73a) it does not establish that he told the Government anything about pondcrete.

"costs of detection and investigation," *United States v. Halper*, 490 U.S. 435, 445 (1989), *overruled on other grounds*, *Hudson v. United States*, 522 U.S. 93 (1997), not those who inundate the Government with raw documents hoping that the Government will make something of them.

6. Finally, Stone's free-floating plea for a remand and a second bite at the apple should be rejected. Stone Br. at 50. There are no material factual disputes, the record here is amply clear about the limits of Stone's knowledge, and the lower courts need the guidance that can only come from this Court's application of the correct statutory interpretation. Stone has had seventeen years to establish his direct and independent knowledge—he is entitled to nothing more.

Similarly, no "additional inquiry" into whether there was a qualifying public disclosure is called for. As the Government explains, § 3730(e)(4)(A) is a "quick trigger." U.S. Br. at 36. The public disclosure here was thus easily sufficient. *See* Pet. Br. at 4–5. And Stone's suggestion that clarifying the specific "information" a relator must know under § (e)(4)(B) would somehow change the test for a disclosure of "allegations" under § (e)(4)(A) is meritless. The two sections operate at very different levels of generality: Subsection (A) is satisfied by disclosures of "allegations" while subsection (B) requires "direct and independent knowledge" of "the information." But regardless, Stone has long since waived any objection to the adequacy of the public disclosure and the applicability of § 3730(e)(4). At no point in this case's seventeen year history has Stone ever argued that the public disclosure was inadequate. He told both the district court and the Tenth Circuit that this "FCA case is 'based upon the public disclosure of allegations.'" JA 312–13; *see also* Pet. Br. at 9–10. The time to contest the applicability of § 3730(e)(4) has long passed.

## CONCLUSION

This Court should reverse the judgment of the Tenth Circuit and remand for dismissal of Stone's claims.

Respectfully submitted,

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468E (12)

No. 05-1272

Supreme Court, U.S.
FILED
OCT 26 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP.
AND BOEING NORTH AMERICAN, INC.,
*Petitioners,*

v.

UNITED STATES OF AMERICA AND UNITED STATES OF
AMERICA *EX REL.* JAMES S. STONE,
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**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Tenth Circuit**

## BRIEF AMICI CURIAE FOR THE AMERICAN HOSPITAL ASSOCIATION, THE FEDERATION OF AMERICAN HOSPITALS, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AND THE AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST OF AMICI CURIAE ..... 2

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 8

TO QUALIFY AS A PROPER *QUI TAM* RELATOR, A PLAINTIFF MUST SATISFY A NUMBER OF RIGOROUS STANDARDS UNDER THE FALSE CLAIMS ACT—THE "ORIGINAL SOURCE" RULE AMONG THEM ..... 8

A. *Qui Tam* Relators Must Plead False Claims Act Violations With Specificity ..... 8

B. The "First-To-File" Bar Also Informs The Standard To Be Applied In Determining What Constitutes An Original Source ..... 12

C. The Original Source Exception Must Be Applied With Similar Rigor ..... 15

D. Lenient *Qui Tam* Requirements And Opportunistic Relators Harm The Health Care Industry ..... 23

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

Page

*CASES*:

*Allina Health Sys. Corp.* v. *United States ex rel. Minnesota Ass'n of Nurse Anesthetists*, 537 U.S. 944 (2002) ..... 3

*Bannon* v. *Edgewater Med. Ctr.*, 406 F. Supp. 2d 907 (N.D. Ill. 2005) ..... 24

*Bly-Magee* v. *California*, 236 F.3d 1014 (9th Cir. 2001) ..... 8, 12

*Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562 (11th Cir. 1994) ..... 20

*Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611 (2005) ..... 17

*Fluor Hanford, Inc.* v. *United States*, 66 Fed. Cl. 230 (2005) ..... 26

*Friedman* v. *Berger*, 547 F.2d 724 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977) ..... 3

*Gold* v. *Morrison-Knudsen Co.*, 68 F.3d 1475 (2d Cir. 1995), *cert. denied*, 517 U.S. 1213 (1996) ..... 8

*Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276 (10th Cir. 2004) ..... 12, 13

*Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) ..... 10, 19

*Hays* v. *Hoffman*, 325 F.3d 982 (8th Cir.), *cert. denied*, 540 U.S. 877 (2003) ..... 26

*HCA Inc.* v. *Commissioner*, 542 U.S. 813 (2004) ..... 3

*Herweg* v. *Ray*, 455 U.S. 265 (1982) ..... 4

**TABLE OF AUTHORITIES—Continued**

Page

*Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 3, 5, 23, 25

*In re Stac Elec. Sec. Litig.*, 89 F.3d 1399 (9th Cir. 1996), *cert. denied*, 520 U.S. 1103 (1997) ..... 12

*Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir.), *cert. denied*, 537 U.S. 944 (2002) ..... 21

*Rehabilitation Ass'n of Va., Inc.* v. *Kozlowski*, 42 F.3d 1444 (4th Cir. 1994), *cert. denied*, 516 U.S. 811 (1995) ..... 3

*Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) ..... 25

*Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981) ..... 3

*Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) ..... 3

*Stern* v. *Leucadia Nat'l Corp.*, 844 F.2d 997 (2d Cir.), *cert. denied*, 488 U.S. 852 (1998) ..... 9

*United States* v. *Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) ..... 17

*United States v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir.), *petition for cert. filed*, (Oct. 2, 2006) (No. 06-473) ..... 24

*United States* v. *Griswold*, 24 F. 361 (D. Or. 1885) ... 5

*United States* v. *Kitsap Physicians Serv.*, 314 F.3d 995 (9th Cir. 2002) ..... 19

**TABLE OF AUTHORITIES—Continued**

Page

*United States ex rel. Aflatooni* v. *Kitsap Physician Servs.*, 163 F.3d 516 (9th Cir. 1999) ..... 5, 20, 21

*United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 342 F.3d 634 (6th Cir. 2003) ..... 8

*United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) ..... 5, 8, 9, 10, 19

*United States ex rel. Devlin* v. *California*, 84 F.3d 358 (9th Cir.), *cert. denied*, 519 U.S. 949 (1996) ..... 20

*United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997) ..... 10, 25

*United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996) ..... 20

*United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F. 3d 1038 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2964 (2005) ..... 24

*United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214 (D.C. Cir. 2003) ..... 12, 13

*United States ex rel. Holmes* v. *Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003) ..... 16

*United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) ..... 19, 21

**TABLE OF AUTHORITIES—Continued**

Page

*United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir.), *cert. denied*, 2006 WL 1880380 (Oct. 2, 2006) (No. 06-12) ..... 5, 11

*United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004) ..... 5, 8, 9, 10, 11, 19

*United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227 (3d Cir. 1998) ..... 8, 13, 14, 15

*United States ex rel. Lujan* v. *Hughes Aircraft Corp.*, 243 F.3d 1181 (9th Cir.), *cert. denied*, 534 U.S. 1040 (2001) ..... 13, 14, 21

*United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) ..... 4

*United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2002) ..... 15

*United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) ..... 20

*United States ex rel. Ortega* v. *Columbia Healthcare Inc.*, 240 F. Supp. 2d 8 (D.D.C. 2003) ..... 14

*United States ex rel. Reagan* v. *East Texas Med. Ctr. Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004) ..... 24

*United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) ..... 16

*United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 21, 23

**TABLE OF AUTHORITIES—Continued**


| | Page |
|---|---|
| *United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997) | 9 |
| *United States ex rel. Totten* v. *Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2002) | 8 |
| *United States ex rel. Zaretsky* v. *Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006) | 24 |
| *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) | 3, 8, 9 |
| *Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005) | 13, 14, 15, 23 |
| *Wang* v. *FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) | 22 |
| *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473 (2002) | 3 |
| *X Corp.* v. *Doe*, 816 F. Supp. 1086 (E.D. Va. 1993) | 19 |
| *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003) | 8, 11 |
| *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001) | 9 |
| *STATUTES*: | |
| False Claims Act, 31 U.S.C. §§ 3729 *et seq.* | 4 |
| 31 U.S.C. § 3729(a) | 4, 9 |
| 31 U.S.C. § 3729(a)(1) | 8 |
| 31 U.S.C. § 3730 | 10, 23 |
| 31 U.S.C. § 3730(b) | 4 |
| 31 U.S.C. § 3730(b)(2) | 10 |

**TABLE OF AUTHORITIES—Continued**


| | Page |
|---|---|
| 31 U.S.C. § 3730(b)(5) | 12 |
| 31 U.S.C. § 3730(d)(1) | 23 |
| 31 U.S.C. § 3730(d)(2) | 23 |
| 31 U.S.C. § 3730(e)(4)(A) | 7, 16, 20 |
| 31 U.S.C. § 3730(e)(4)(B) | 7, 16, 20 |
| *REGULATIONS*: | |
| 28 C.F.R. § 85.3(9) | 4 |
| 64 Fed. Reg. 47099 (Aug. 30, 1999) | 4 |
| *RULES*: | |
| S. Ct. Rule 37.6 | 1 |
| Fed. R. Civ. P. 8(a) | 9 |
| Fed. R. Civ. P. 9(b) | passim |
| *LEGISLATIVE MATERIAL*: | |
| *False Claims Act Implementation: Hearing Before Subcomm. on Admin. Law and Gov. Relations of House Comm. on Judiciary*, 101st Cong. 2d Sess. (1990) | 6 |
| S. Rep. No. 99-345 (1986) | 19 |
| *The Federal Government's Anti-Fraud Efforts: Hearing Before the Senate Special Comm. on Aging*, 107th Cong. (2001) | 4 |

**TABLE OF AUTHORITIES—Continued**

Page

*OTHER AUTHORITIES*:

Keith D. Barber *et al.*, *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131 (2004).. 27

John Boese, *Civil False Claims and* Qui Tam *Actions* § 4.03[C][2] (2005) ..... 14

Letter from Dennis E. Burke, President, Good Shepherd Health Care System, to Congressman Ron Wyden (Aug. 23, 2006), *available at* http://www.aha.org/aha/content/2006/pdf/wydenltr.pdf ..... 27

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Uwe E. Reinhardt, *Medicare Can Turn Anyone Into A Crook*, Wall St. J., Jan. 21, 2000 ..... 5, 26

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## STATEMENT OF INTEREST OF AMICI CURIAE[1]

Founded in 1898, the American Hospital Association (AHA) is the national advocacy organization for hospitals in this country. It represents approximately 5,000 hospitals, health care systems, and other health care organizations, as well as 35,000 individual members. AHA leads, represents, and serves health care provider organizations that are committed to health care improvement.

The Federation of American Hospitals (FAH) is the national representative of investor-owned or managed community hospitals and health systems throughout the United States. FAH's members include rural and urban teaching and non-teaching hospitals and provide a wide range of ambulatory, acute and post-acute services.

The Association of American Medical Colleges (AAMC) is a nonprofit association representing all 125 accredited United States and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems, including 68 Department of Veterans Affairs medical centers; and 96 academic and scientific societies. Through these institutions and organizations, AAMC represents 109,000 faculty members, 67,000 medical students, and 104,000 resident physicians.

The American Health Care Association (AHCA) is one of the nation's leading long-term care organizations. AHCA represents more than 10,000 non-profit and proprietary facilities dedicated to improving the delivery of professional

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. All parties have consented to the filing of this brief; their consent letters have been filed with the Clerk.

and compassionate care provided daily to more than 2.5 million frail, elderly, and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities.

One way in which the AHA, FAH, AAMC, and AHCA promote the interests of their members is by participating as amici curiae in cases with important and far-ranging consequences for their members—including cases arising under the False Claims Act. *See, e.g.*, *HCA Inc.* v. *Commissioner*, 543 U.S. 813 (2004) (FAH amicus brief); *Allina Health Sys. Corp.* v. *United States ex rel. Minnesota Ass'n of Nurse Anesthetists*, 537 U.S. 944 (2002) (AHA amicus brief); *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473 (2002) (AHCA amicus brief); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (AHA amicus brief); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (AHA amicus brief); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (AAMC amicus brief).

The question presented in this petition is of tremendous importance to amici's members. The federal government funds in full or in part a substantial percentage of the health services amici provide, including under the Medicare and Medicaid statutes and accompanying regulations—described by this Court as "Byzantine" texts "among the most intricate ever drafted by Congress." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981); *see also Friedman* v. *Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (Friendly, J.) (noting that the Social Security Act is "almost unintelligible to the uninitiated"); *Rehabilitation Ass'n of Va., Inc.* v. *Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994) (Medicare statutes and regulations "are among the most completely impenetrable texts within human experience").

Hospitals and health systems constantly navigate the "morass of bureaucratic complexity" of the federal health care programs, *Herweg* v. *Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting), submitting, on average, nearly 200,000 claims a day to the Medicare program alone. *See Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts: Hearing Before the Senate Special Comm. on Aging*, 107th Cong. 1, 161 (2001) (testimony of AHA). When providers cross one of the lines in Medicare's "impenetrable" text, *Rehabilitation Ass'n of Va.*, 42 F.3d at 1450, they expose themselves to potential liability under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, which provides for treble damages and penalties of $5,000-$10,000 for every "false claim" knowingly presented to the government. 31 U.S.C. § 3729(a).[2] The Act's *qui tam* provisions, under which private citizens may sue defendants on the government's behalf, augment its powerful arsenal of remedies—and also heighten the risk that violation of a technical rule will be elevated to an allegation of fraud. *See* 31 U.S.C. § 3730(b); *see also United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943) (Act's *qui tam* provisions were founded " 'upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain' ") (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

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[2] Effective September 29, 1999, the Department of Justice adjusted the penalties range from $5,000 - $10,000 to $5,500 - $11,000, pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 31001. *See* 64 Fed. Reg. 47099, 47104 (Aug. 30, 1999), *codified at* 28 C.F.R. § 85.3(9).

False Claims Act lawsuits have proliferated over the past two decades; and the largest subset of False Claims Act suits is in health care.[3] While the United States government pursues about one-third of those lawsuits, many of the remaining actions are prosecuted by relators alone, motivated largely by the statute's contingent bounty provision, and not constrained by the discretion that tempers the zeal of federal prosecutors. *Cf. Hughes Aircraft Co.*, 520 U.S. at 949 ("*Qui tam* relators are * * * less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). The overwhelming majority of those declined health care *qui tam* cases produce *no* recovery for the United States (or the relator) and a substantial number of those cases are dismissed, but only after burdensome and expensive pre-trial litigation. *See, e.g., United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 556-561 (8th Cir.), *cert. denied* (No. 06-12), 2006 WL 1880380 (Oct. 2, 2006); *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-228 (1st Cir. 2004); *United States ex rel. Clausen* v. *Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002); *United States ex rel. Aflatooni* v. *Kitsap Physician Servs.*, 163 F.3d 516 (9th Cir. 1999).

Amici accordingly have a strong interest in maintaining rigorous and easily applicable rules for discerning between cases prosecuted by legitimate relators with credible direct

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[3] *See* GAO, Letter to Hon. F. James Sensenbrenner, Jr., Hon. Chris Cannon, and Hon. Charles E. Grassley, *Information on False Claims Act Litigation* 28 (Jan. 31, 2006) (noting that 45.98 percent of *qui tam* cases involved alleged health care fraud) (hereinafter "GAO 2006 Report"). One commentator has posited that the reason for the spike in health-care-related False Claims Act suits is "that health-care regulations have just become too complicated to understand." Uwe E. Reinhardt, *Medicare Can Turn Anyone Into A Crook*, Wall St. J., Jan. 21, 2000, at A18.

allegations of fraud and what have been described as "parasitic" False Claims Act cases. *See False Claims Act Implementation: Hearing Before Subcomm. on Admin. Law and Gov't Relations of House Comm. on Judiciary*, 101st Cong., 2d Sess. 3 (1990) (1986 amendments to False Claims Act "sought to resolve the tension between * * * encouraging people to come forward with information and * * * preventing parasitic lawsuits") (statement of Sen. Grassley).

## SUMMARY OF ARGUMENT

A relator who brings a False Claims Act *qui tam* action based on publicly disclosed allegations must be an "original source" of the information on which the allegations are based; a court lacks jurisdiction to hear the suit otherwise. 31 U.S.C. § 3730(e)(4). The measure by which to determine whether a putative relator is an "original source" should be taken with a keen eye toward the Act's other requirements, and in particular other threshold predicates imposed by Congress and the courts on relators who purport to bring their actions on behalf of the United States.

The False Claims Act is a fraud statute, and courts have long held that fraud allegations are not to be lightly brought or allowed. Courts analyzing a relator's fraud claims brought under the False Claims Act's *qui tam* provisions therefore impose scrupulous standards for determining whether that relator is in fact a proper person to bring a suit—and to wear the mantle of the government when suing. Without fail courts apply the heightened pleading standard articulated in Federal Rule of Civil Procedure 9(b) when assessing a relator's claims of fraud against the government. They similarly apply, without exception, a strong "first-to-file" rule—a statutory prohibition against empowering more than one relator per alleged scheme—barring even legitimate subsequent relators from garnering a bounty if they arrive after a qualified relator already has staked his claim. At the

heart of each of these rigorous requirements is the same basic principle: a proper False Claims Act relator is one who has sufficient firsthand knowledge of false or fraudulent claims to put the government on notice of their existence and vindicate the interests of the United States in court.

Courts should apply a no less rigorous standard to determine whether a putative relator qualifies as an "original source." A court may take jurisdiction over a *qui tam* "action based upon the public disclosure of allegations or transactions" only if "the person bringing the action is an original source of the information"—meaning that he or she has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(A), (B). Until the decision below, courts had rigorously applied the "original source" requirement, just as they had unfailingly applied rigorous pleading and timing inquiries to a relator's claims.

The Tenth Circuit, however, applied a far more lenient test of the relator's status as an "original source," requiring only that the relator have obtained knowledge of some of the background facts relevant to the claim. No matter that the relator's direct knowledge, such as it was, was stale, vague, and admittedly premised on layers of surmise; the Tenth Circuit inferred, and found sufficient, a tenuous connection to the false claims articulated in the relator's complaint.

The Tenth Circuit's decision substantially watered down one of the fundamental predicates of a *qui tam* claim. If the court of appeals' overly accommodating "original source" standard remains in place, it will threaten amici's members with increased exposure to ill-supported False Claims Act lawsuits pursued by opportunistic relators, diverting precious resources away from patient care and other essential mis-

sions—and most often into the defense of costly litigation the alleged victim of the fraud has elected *not* to pursue.

## ARGUMENT

### TO QUALIFY AS A PROPER *QUI TAM* RELATOR, A PLAINTIFF MUST SATISFY A NUMBER OF RIGOROUS STANDARDS UNDER THE FALSE CLAIMS ACT—THE "ORIGINAL SOURCE" RULE AMONG THEM

#### A. *Qui Tam* Relators Must Plead False Claims Act Violations With Specificity.

The False Claims Act is an anti-fraud statute; all of the courts to have addressed the issue agree on that. *See* 31 U.S.C. § 3729(a)(1) (prohibiting submission to the federal government of "false or fraudulent" claims); *Stevens*, 529 U.S. at 781 (noting the "unobjectionable proposition * * * that the [False Claims Act] was intended to cover all types of fraud"); *United States ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 342 F.3d 634, 640 (6th Cir. 2003); *Bly-Magee* v. *California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *Gold* v. *Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995). In cases arising under the False Claims Act—as in other cases in which claims of fraud are made—courts accordingly apply the stringent pleading standard articulated in Federal Rule of Civil Procedure 9(b) to determine whether a claim may move forward beyond the pleading stage.[4]

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[4] *See, e.g.*, *Karvelas*, 360 F.3d at 227; *Clausen*, 290 F.3d at 1309; *Yuhasz* v. *Brush Wellman, Inc.*, 341 F.3d 559, 562-563 (6th Cir. 2003); *United States ex rel. Totten* v. *Bombardier Corp.*, 286 F.3d 542, 551-552 (D.C. Cir. 2002); *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 783-784 (4th Cir. 1999); *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir.

Most federal civil complaints need only articulate a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 9(b) requires more: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

In addition to providing a fraud defendant notice of a plaintiff's claim, Rule 9(b) has the "equally strong purpose," *Clausen*, 290 F.3d at 1313 n.24, of protecting defendants from "harm to [their] reputation or goodwill" resulting from poorly supported but potentially poisonous allegations of fraud. *Stern* v. *Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988); *see also Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (Rule 9(b) "protect[s] defendants against spurious charges"); *Karvelas*, 360 F.3d at 226 (Rule 9(b) "give[s] notice to defendants of the plaintiffs' claim, * * * protect[s] defendants whose reputation may be harmed by meritless claims of fraud, * * * discourage[s] 'strike suits' and * * * prevent[s] the filing of suits that simply hope to uncover relevant information during discovery") (quotation omitted). Those protections are all the more warranted in False Claims Act *qui tam* cases, where the promise of a cut of treble damages and penalties lures would-be relators. *See* 31 U.S.C. 3729(a); *Stevens*, 529 U.S. at 784-785 (observing that the False Claims Act "imposes damages that are essentially punitive in nature"); *Clausen*, 290 F.3d at 1313 n.24 (*qui tam* cases should be scrutinized under Rule 9(b) because the False Claims Act "provides a windfall for the first person to file").

There are other reasons largely unique to False Claims Act *qui tam* cases that demonstrate the importance and efficacy of Rule 9(b)'s heightened pleading standard. To begin with,

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1998); *United States ex rel. Thompson* v. *Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997).

a relator brings a False Claims Act case not for his own alleged injury, but for that of the United States. 31 U.S.C. § 3730. Rule 9(b)'s strict pleading standard, coupled with the Act's other predicates, guarantees that the relator deserves that unique station and is equipped to carry out that weighty charge. The False Claims Act also requires the government (absent an extension) to opt to intervene, or to decline to intervene, in a False Claims Act lawsuit within 60 days of its filing under seal. 31 U.S.C. § 3730(b)(2). A rigorous pleading standard ensures that the government is privy to sufficient detail about the relator's allegations, at the earliest possible stage, to facilitate an informed choice to investigate and to intervene or decline to intervene. As the First Circuit has observed, "allowing a relator to plead generally at the outset and amend the complaint * * * after discovery would be at odds with the FCA's procedures for filing a *qui tam* action and its protections for the government (which is, of course, the real party in interest in a *qui tam* action)." *Karvelas*, 360 F.3d at 231.

Courts accordingly invoke Rule 9(b) in False Claims Act cases to require that a relator provide details identifying particular allegedly false claims for payment submitted to the government. *See Clausen*, 290 F.3d at 1311 ("if Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an *actual false claim* for payment"). A relator's complaint must identify the parties, contracts, or fraudulent acts that form the basis of the fraud allegations. *See Harrison*, 176 F.3d at 784; *Thompson*, 125 F.3d at 903 ("At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud.") (internal quotation omitted). Rule 9(b)'s basic menu of requirements thus aids in discerning between "whistle-blowing insiders with genuinely valuable information" and "opportunistic plaintiffs who have no significant information to contribute on their own." *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 680

(D.C. Cir. 1997) (quotation omitted); *see also Clausen*, 290 F.3d at 1313 n.24 (permitting a plaintiff "to learn the complaint's bare essentials through discovery * * * may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements"); *cf. Joshi*, 441 F.3d at 558 (pleading on "information and belief" insufficient to meet the heightened pleading standard of Rule 9(b)). A False Claims Act complaint that fails to meet Rule 9(b)'s requisite level of specificity will be dismissed. *See, e.g., Karvelas*, 360 F.3d at 233; *Yuhasz*, 341 F.3d at 566.

In *Karvelas*, for example, the relator alleged that the defendants had committed serious violations of patient care standards. The First Circuit affirmed the district court's dismissal of the relator's complaint for failure to allege "the particulars of any of his allegations concerning the presentation of false claims to the government." 360 F.3d at 233 n.17. The relator had attempted to "describe at considerable length" sixteen different fraud schemes, but he had never "specifie[d] the dates or content of *any* particular false or fraudulent claim allegedly submitted for reimbursement." *Id.* (emphasis added). The relator had at most alleged violations of federal regulations; but a False Claims Act case is predicated on specific allegations of fraud, not assertions of regulatory noncompliance. *Id.* at 234; *see also Yuhasz*, 341 F.3d at 564 (relator's complaint found deficient under Rule 9(b) where it failed to identify parties, contracts, or details of the fraudulent scheme, stating only that "certain" testing conducted by a contractor resulted in the submission of false claims to the government).

Courts reviewing False Claims Act complaints thus consistently employ Rule 9(b) as a tool for determining whether putative relators possess sufficiently detailed information about the alleged fraudulent scheme to bring a claim on

behalf of the United States. That pleading rule disadvantages only those individuals unequipped to press a *qui tam* suit; for "insiders privy to a fraud on the government should have adequate knowledge of the wrongdoing at issue, [and] * * * should be able to comply with Rule 9(b)." *Bly-Magee*, 236 F.3d at 1019; *see also In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (Rule 9(b) prevents less-than-worthy fraud plaintiffs from " 'unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis' ") (citation omitted).

### B. The "First-To-File" Bar Also Informs The Standard To Be Applied In Determining What Constitutes An Original Source.

Section 3730(b)(5) of the False Claims Act, "known colloquially as the Act's first-to-file bar," *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004), is another example of the standards by which the Act measures the qualifications of those who would allege, and litigate, fraud claims on behalf of the United States government. The first-to-file requirement states that when a person brings a *qui tam* claim, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The first-to-file bar thus limits to one the number of potential relators who can bring claims based on a particular fraud scheme giving rise to a False Claims Act *qui tam* claim. Under the first-to-file rule, there is only one proper *qui tam* relator: the first individual who gave the government notice of the fraud scheme's essential facts.

The courts of appeals have consistently applied this rule to bar claims by subsequent relators alleging the same elements of fraud as the earlier action. *See United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003) (holding that "§ 3730(b)(5) bars any

action incorporating the same material elements of fraud as an action filed earlier"); *United States ex rel. Lujan* v. *Hughes Aircraft Corp.*, 243 F.3d 1181, 1189 (9th Cir. 2001) (holding that "§ 3730(b)(5) bars later-filed actions alleging the same material elements of fraud described in an earlier suit"); *SmithKline*, 149 F.3d at 233 (holding that the False Claims Act "bar[s] a later-filed action alleging the same elements of a fraud described in an earlier suit"); *accord Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 971 (6th Cir. 2005); *Grynberg*, 390 F.3d at 1279.

The bar on subsequent *qui tam* actions involving the same material fraud claim is "exception free." *Lujan*, 243 F.3d at 1183, 1187. It applies regardless of whether the subsequent action alleges new or additional facts about how the fraud occurred. *See Grynberg*, 390 F.3d at 1279 (barring subsequent *qui tam* action raising "the same essential claim" of fraudulently measuring natural gas output, even though subsequent action alleged specific fraudulent measurement techniques not included in first complaint); *Hampton*, 318 F.3d at 218 (barring subsequent *qui tam* action alleging fraud by a specific subsidiary of the defendant in the first-filed action and certain named employees of the subsidiary because "these are not differences in the material elements of the fraud" but "merely variations on the fraud" alleged in the first action); *Lujan*, 243 F.3d at 1189 (barring subsequent *qui tam* action alleging fraud within an aircraft program when first-filed complaint alleged fraud between two aircraft programs because subsequent actions are barred "regardless of whether the allegations incorporate somewhat different details"); *LaCorte*, 149 F.3d at 235-237 (barring subsequent *qui tam* action alleging new facts detailing more precisely how the defendant overcharged the government).

The first-to-file rule thereby balances two goals of the *qui tam* provisions: "preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on

the other." *LaCorte*, 149 F.3d at 233. Strict application of the first-to-file bar recognizes that only the "first-filed claim provides the government notice of the essential facts of an alleged fraud." *Lujan*, 243 F.3d at 1187; *see also Walburn*, 431 F.3d at 970 (explaining that the *qui tam* provisions are designed to prevent would-be relators from "feed[ing] off a previous disclosure of fraud"). Once the government has notice of the essential elements of an alleged fraud, even those individuals in possession of additional particulars about the fraud—details that may be helpful to the government's investigation—are strictly barred from bringing suit. *See generally* John Boese, *Civil False Claims and* Qui Tam *Actions* § 4.03[C][2] (2005) ("[T]he fact that a subsequent suit relates to a different time frame, geographic area, or contract does not give rise to a sufficiently different cause of action to overcome the application of Section 3730(b)(5).").

The first-to-file rule also recognizes that as a matter of fairness, claimants alleging the same fraud should not share in any *qui tam* award because "their allegations are unlikely to increase the total recovery." *LaCorte*, 149 F.3d at 234. Indeed, "such duplicative claims do not help reduce fraud or return funds to the federal fisc." *Id.*; *see also Lujan*, 243 F.3d at 1189 (noting that subsequent claims "have no additional benefit to the government").

Limiting recovery to only the first person to notify the government of the fraud also avoids the practical effect of allowing subsequent claims to proceed, which would divide the bounty among more and more relators, and thereby reduce the incentive to come forward promptly with knowledge of fraudulent conduct. *United States ex rel. Ortega* v. *Columbia Healthcare Inc.*, 240 F. Supp. 2d 8, 12 (D.D.C. 2003). Not every citizen is entitled to a bounty for an act of public service, *id.* at 14, nor did Congress intend to provide bounties to would-be relators who perform "little if any public service" because the government already had been

made aware of the material elements of the fraud. *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000).

Perhaps because of its absolute consequences, courts invoke the first-to-file rule only after an initial assessment that the first-filed *qui tam* claims have been advanced by a proper relator—including whether the first-filed claims pass muster under Rule 9(b). A *qui tam* complaint that *fails* to plead a False Claims Act violation with the specificity required by Rule 9(b) will not bar a subsequent *qui tam* action that *does* satisfy that standard. *See Walburn*, 431 F.3d at 972 (complaint must allege violations of the FCA with particularity before it can be said to give the government notice of the essential elements of a fraudulent scheme); *LaCorte*, 149 F.3d at 234 (incorporating Fed. R. Civ. P. 9(b) standard to first-to-file rule). Only a relator who has pled facts sufficient to give the government actual notice of the essential elements of a fraudulent scheme (and not merely of some facts that upon investigation would reveal that a fraud had occurred) will be recognized as *the* relator for that scheme. The two requirements—the heightened pleading rule and the strict first-in-time rule—thus work in tandem to ensure the legitimacy of any relator's license to prosecute fraud claims on behalf of the United States government.

### C. The Original Source Exception Must Be Applied With Similar Rigor.

So, too, with the "original source" rule. That inquiry serves an equally important purpose and should be applied as rigorously as the heightened pleading standard and the Act's strict first-in-time bar.

When Congress amended the Act's *qui tam* provisions in 1986, it aimed "to encourage private citizens with first-hand knowledge to expose fraud," while at the same time seeking "to avoid civil actions by opportunists attempting to capital-

ize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Holmes* v. *Consumer Ins. Group*, 318 F.3d 1199, 1222 (10th Cir. 2003) (quotation marks and citations omitted); *see also, e.g.*, *United States ex rel. Siller* v. *Becton Dickinson Co.*, 21 F.3d 1339, 1347 (1994) (Congress in the 1986 amendments sought to "encourage more private enforcement suits" while preventing "parasitic *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud.") (quotation marks and citations omitted).

To those ends, Congress limited a federal court's jurisdiction over False Claims Act *qui tam* claims:

> No court shall have jurisdiction over an action [under the False Claims Act] based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

For purposes of this "public disclosure bar," the Act defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B); *see also United States* v. *Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) ("To be 'original' the plaintiff must have 'direct and independent knowledge of the information on which the allegations are based.' To be a 'source' the plaintiff must have 'voluntarily provided the information to the Government before filing an action[.]'").

Congress thus specified in Section 3730(e)(4) that where a *qui tam* action is based upon allegations or transactions already in the public domain, a relator may pursue such an action to vindicate an alleged fraud on the federal fisc only when the relator qualifies as an original source; a court lacks jurisdiction over the suit otherwise. That jurisdictional requirement must be interpreted in a manner that is true to statutory text. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005). The Tenth Circuit's holding that the relator in *Rockwell* knew and disclosed to the government "the information on which the allegations are based," so as to qualify as an original source, is anything but true to the text of the original source rule.

In his *qui tam* complaint, Stone, the *Rockwell* relator, alleged that he had personal knowledge of actual violations of the False Claims Act. Alleging that Rockwell had "committed numerous violations" of a laundry list of federal and state environmental laws and rules, Stone then recited the elements of a False Claims Act violation:

> [I]n order to induce the government to make payments or approvals, Rockwell violated § 3729(a) of the FCA by, inter alia, knowingly presenting or causing to be presented to an officer or employee of the United States government, false and fraudulent claims for payment or approval, including requests or statements for payment, statements for reimbursement of costs, and applications for bonuses in connection with or under the Rockwell-DOE contracts; and knowingly making, using, or causing to be made or used, false records or statements intended to obtain approval and payment of these monies. [Pet. App. 6a (quotation marks and citation omitted)].

But as the case moved into discovery, Stone conceded that he had no knowledge—direct or indirect, independent or otherwise—on which these essential allegations were based. In fact, Stone conceded that he had no firsthand knowledge

that anyone at Rockwell had made a specific false statement to the government, nor did he have knowledge of any specific false record or claim. *Id.* at 13a. The Tenth Circuit nevertheless concluded that Stone's "direct and independent knowledge," limited to a belief that certain flaws in a proposed Rockwell design led to "the release of toxic waste," and the recollection that one Rockwell manager years earlier "forbade him from discussing any environmental problems at Rocky Flats with DOE," established "that he had direct and independent knowledge of the information on which his [False Claims Act] claim was based." *Id.* at 17a, 19a, 20a.

Similarly without reference to any evidence of an actual False Claims Act violation, the court then concluded that Stone satisfied the second component of the original source rule—requiring the relator to provide to the government the information on which the False Claims Act allegations are based before filing his claim. The court found Stone met this important burden by providing the government with one document—an "Engineering Order" with a margin note from Stone—that did not address a single false claim allegedly submitted, nor a single false statement allegedly made, to the United States (nor, for that matter, "the release of toxic waste" on which the court found his allegations to be based). *See id.* at 51a.

The court's conclusion that Stone qualified as an original source was based on the faulty premise that the "gravamen" of Stone's False Claims Act claim was his prediction, upon "studying Rockwell's plans for manufacturing pondcrete[,] that the blocks would leak toxic waste." Pet. App. 21a. But the "gravamen" of a False Claims Act complaint is not a potential infraction of some other statute, rule, or regulation protecting the environment. *See, e.g., United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA."); *X Corp.* v. *Doe*, 816 F.

Supp. 1086, 1093 (E.D. Va. 1993) ("The heart of fraud is an intentional misrepresentation. A violation of a regulatory provision, in the absence of a *knowingly* false or misleading representation, does not amount to fraud.") (emphasis in original). The "gravamen" of a False Claims Act complaint is the knowing submission to the United States of a false claim for payment. *See, e.g., Karvelas*, 360 F.3d at 234 ("alleged violations of federal regulations are insufficient to support a claim under the FCA"); *United States* v. *Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002) ("[I]t is the claim itself that is central to [an FCA] action"); *Clausen*, 290 F.3d at 1311 (submission to the government of a false claim for payment is "the *sine qua non* of a False Claims Act violation") (emphasis in original); *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("the False Claims Act at least requires the presence of a claim—a call upon the government fisc—for liability to attach.").

The Tenth Circuit's holding that a *qui tam* relator may invoke the original source exception to the public disclosure bar merely by demonstrating direct and independent knowledge of a potential statutory or regulatory violation, and by voluntarily providing only that information to the government, does not square with Congress's intent "to encourage any individual knowing of Government *fraud* to bring that information forward." S. Rep. No. 99-345, at 1 (1986) (emphasis added). *See also, e.g., United States ex rel. Fine* v. *Advanced Sciences, Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) ("Congress sought to increase private enforcement of the False Claims Act by encouraging insiders with information of *fraud* to come forward.") (emphasis added).

The Tenth Circuit's standard also conflicts with those articulated by many other courts of appeals. Consistent with the purposes of the False Claims Act's *qui tam* provisions, the Third Circuit requires a relator whose claim is based upon publicly disclosed allegations or transactions to have "'direct

and independent knowledge' of the most critical element of its claims"—that is, "the alleged misrepresentations to [the Government]." *United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999) (Alito, J.). Under the Third Circuit's standard, "a relator cannot be said to have 'direct and independent knowledge of the information on which [its fraud] allegations are based,' 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent statements." *Id.* at 389. Likewise, in *Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994), the Eleventh Circuit ruled that a relator qualified as an original source where he had direct and independent knowledge, and disclosed to the government, the fraud alleged in the *qui tam* complaint: that an insurance company submitted claims for payment to Medicare knowing that the insurance company, and not Medicare, was responsible to pay those claims. *Id.* at 564-568.

The Ninth Circuit similarly requires that, to qualify as an original source, would-be relators must "see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else." *United States ex rel. Devlin* v. *California*, 84 F.3d 358, 361 (9th Cir. 1996). In *Aflatooni*, 163 F.3d 516, the Ninth Circuit considered a case in which a physician purported to bring a *qui tam* action alleging, among other things, that a Medicare provider and certain other defendants "submitted or caused the submission of claims to Medicare for services that either were not medically necessary * * *, were not performed at all, or were billed as separate services when they should have been billed as one service[.]" *Id.* at 520. The court held that the physician's allegations against those defendants were based upon public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A), and rejected the physician's argument that he was an "original source" with respect to those claims, because the physician had failed to show that he had "first-

hand knowledge of the alleged fraud." *Aflatooni*, 163 F.3d at 522-525. The physician "could not recall the name of any *Medicare* person (patient) who was [allegedly] charged for unnecessary medical procedures," nor did he "point to any other evidence in the record which suggests that he has 'information,' as opposed to speculation, of [the defendants'] involvement in the submission of false Medicare claims." *Id.* at 526 (emphasis in original).

The D.C. and Eighth Circuits' interpretation of the original source rule "does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent *transaction*," but rather, that the relator have direct and independent knowledge of an "essential element underlying the fraud transaction." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 656-657 (D.C. Cir. 1994) (emphases in original); *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (same). But under this standard, too, information about a statutory or regulatory violation—or, in Stone's case, general speculation about an inchoate violation—does not, without more, establish a relator as an original source, because it is not information on which an allegation of *fraud* can be based. *See, e.g.*, *Hopper*, 91 F.3d at 1266 ("It is the false *certification* of compliance [with laws, rules, or regulations] which creates [False Claims Act] liability when certification is a prerequisite to obtaining a government benefit.") (emphasis in original).

Most courts—save the Tenth Circuit—therefore assess whether a putative relator is a proper relator based on one general guiding rule: a proper relator is one who has pled and provided "the government notice of the essential facts of an alleged fraud." *Lujan*, 243 F.3d at 1187. To state a viable claim under the False Claims Act, a relator must allege with particularity the "who, what, when, where, and how" of the alleged fraud. *See supra* at 9-12. So, too, only a relator who

meets that standard of disclosing a fraudulent scheme in a sealed *qui tam* complaint provides sufficient notice to the government to lay claim to the first-to-file rule's exclusivity provision. *See supra* at 12-15. The "information" required for original source status can be no less than that required to support such allegations with respect to the essential elements of the fraud. *See Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (by distinguishing between "allegations" and the "information on which the allegations are based," the FCA "appears to be invoking the common logical distinction between an assertion and its proof. * * * An allegation can be made public, even if its proof remains hidden.").

The Tenth Circuit erred in holding that the original source rule can be satisfied by knowledge and prior disclosure to the government of a statutory or regulatory violation, absent direct and independent knowledge and prior disclosure of any critical element of the alleged fraud itself. Under the standard adopted by the court of appeals in this case, a relator could prosecute a False Claims Act case against any highly regulated entity that receives federal funds, based upon already publicly disclosed allegations or transactions of which the government is aware, merely by coming forward with general information concerning some suspected regulatory infraction and a general awareness that the government pays some of its bills. *Cf. Hughes Aircraft Co.*, 520 U.S. at 949 ("*Qui tam* relators are * * * less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."). Indeed, the Tenth Circuit's broad interpretation of the original source rule provides relators and their counsel with an incentive to refrain from disclosing to the government the details on which their False Claims Act allegations are based—potentially discouraging the government from intervening in the case, and thereby driving up relators' attorneys' fees and the relator's share of

any recovery. *See* 31 U.S.C. § 3730 (providing for a greater share of recovery to relators who advance claims in the absence of government intervention); *id.* § 3730(d)(1)-(2) (providing for recovery of relator's attorney's fees upon any settlement or judgment resulting in a recovery for the United States). Such an outcome cannot be what Congress intended in "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own[.]" *Springfield Terminal Ry.*, 14 F.3d at 649.

### D. Lenient *Qui Tam* Requirements And Opportunistic Relators Harm The Health Care Industry.

The False Claims Act has been a powerful tool for recovering dollars for the federal fisc; and many of those dollars have been recovered in health care *qui tam* cases. Several other facts, however, are equally beyond dispute. The government does not intervene in the vast majority of False Claims Act *qui tam* cases. *See* GAO 2006 Report at 27, 29. Ordinarily, litigation under the public disclosure bar arises in declined *qui tam* cases.[5] Because most declined *qui tam* cases are health care cases, many of those declined cases involving the public disclosure bar target health care businesses—providers and manufacturers. *See id.* at 29 (noting that 754 of the 1770 declined case since 1987 were in the health care field).

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[5] *See; e.g.*, *United States ex rel. Zaretsky* v. *Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006); *Walburn*, 431 F.3d 966; *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2964 (2005); *United States ex rel. Reagan* v. *East Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004); *Bannon* v. *Edgewater Med. Ctr.*, 406 F. Supp. 2d 907 (N.D. Ill. 2005).

This case is, in all practical effect, about those more common circumstances; and the Court's decision will clarify the rules such relators must follow before they may receive license to litigate on behalf of the United States. Amici have a strong interest in maintaining a clear and strict "original source" rule—a rule that recognizes and rewards legitimate relators while winnowing out opportunistic bounty hunters. Any standard that would lower the bar to allow relators to bring *qui tam* actions based only on stale hunches and fresh news reports would impose high litigation costs on health care providers at the expense of patients.

According to a recent report from the Government Accountability Office, allegations of health care fraud accounted for 1,145 of the 2,490 *qui tam* cases filed between 1987 and 2005—almost half of all cases filed. GAO 2006 Report at 28. The Department of Health and Human Services was named in 54 percent of all *qui tam* actions initiated during this period—the great bulk of which were filed in the last decade. *Id.* at 26.

Despite this aggressive targeting of the health care field by *qui tam* relators, the Department of Justice has elected to pursue less than a third of all False Claims Act *qui tam* cases brought against health care defendants. *Id.* at 29.[6] This means that in a significant majority of all *qui tam* actions

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[6] One recognized purpose of the public disclosure bar, in fact, is to preserve deference to the government's exercise of prosecutorial discretion in fraud matters. *See United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 685 (D.C. Cir. 1997). In health care cases, for example, the Department of Justice has issued guidelines through which its attorneys must assess their exercise of prosecutorial discretion. *See* Eric H. Holder, Jr., *Memorandum, Guidance on the Use of the False Claims Act in Civil Health Care Matters*, U.S. Dep't of Justice (June 3, 1998), *available at* www.usdoj.gov/dag/readingroom/chcm.htm. Relators are not similarly constrained.

involving health care providers, the government consciously has chosen not to pursue the relator's claims. Instead, these relators have been left free to pursue their claims—and their own pecuniary interests—without the supervision of government officials but with all the trappings of a public charge. *See Hughes Aircraft Co.*, 520 U.S. at 949 ("*qui tam* relators are * * * motivated primarily by prospects of monetary reward rather than the public good"); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 574 (June 2000) (explaining that relators "pursue different goals and respond to different incentives than do public agencies" and have no "direct accountability to the electorate").

The result: hundreds of actions against health care providers by relators who are unsupervised at best and unscrupulous at worst. Relators in declined health care *qui tam* cases often bring claims based on highly creative theories of liability, and often bring them in cases where health care providers unwittingly ran afoul of complex federal requirements. *See* Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1368 (Mar. 2002) (explaining this phenomenon). And at their worst, these relators bring picayune or meritless claims the defense of which drains health care providers of badly needed resources. *See Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) (noting that "[o]f the 1,966 [of all *qui tam*] cases that the government has refused to join, only 100 have resulted in recoveries (5%)"); *see also* GAO 2006 Report at 36 (noting that the median recovery in declined *qui tam* cases is just over $22,000). And even the GAO's statistics likely inflate the merit of such claims, where the risk of huge per-claim penalty awards and the inevitable high cost of protracted litigation forces providers to settle these cases—often for large sums—despite the absence of any

culpable wrongdoing on their part. *See* Krause, *supra*, at 1368.[7]

Not only is this inconsistent with the purpose of *qui tam* actions—which are designed to prevent fraud on the government, not punish misinterpretations of complex federal law—it is harmful to the interests of patients and the communities these providers serve. Available statistics do not account for the resources health care providers must also expend in defending *qui tam* suits—including meritless *qui tam* suits—not to mention the hefty attorney's fees providers must pay in cases they settle to avoid further defense costs.[8]

Although some recoveries under the Act are unquestionably legitimate, others are the result of health care providers making the rational business decision not to challenge tenuous claims that would require long and expensive litigation to expose and defeat. *See* Reinhardt, *supra*, at A18 ("Rather than engaging in a long, protracted fight to set the record straight, throughout which share prices suffer and business slumps, a health company's best bet may simply be to hand over the fines and get on with business."). These questionable cases—whether settled early or litigated to a conclusion—divert enormous resources away from providers' core responsibility: caring for patients. *See* Keith D.

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[7] Unlike procurement cases, like this one, where the damages trebled on any one claim far exceed the penalty imposed on that claim, health care cases often involve the prospect of small per-claim damages dwarfed exponentially by penalties awarded at $5,000 to $10,000 per claim *See, e.g., Hays* v. *Hoffman*, 325 F.3d 982, 992-994 (8th Cir. 2003).

[8] Unlike defense and other contractors, moreover—which typically are indemnified by the government for attorney's fees in cases where no wrongdoing is found, *see Fluor Hanford, Inc.* v. *United States*, 66 Fed. Cl. 230, 231 (2005)—most health care providers must shoulder such costs regardless of the result.

Barber *et al.*, *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131, 172 (2004) ("unjust settlements * * * often include payment of penalties that further divert resources from the provision of health care").

One hospital's story stands as an illuminating example. In early 2003, Good Shepherd Medical Center in Hermiston, Oregon, was the subject of an FBI raid after a relator filed a sealed *qui tam* complaint alleging vast irregularities in the hospital's billing practices. *See* Letter from Dennis E. Burke, President, Good Shepherd Health Care System, to Senator Ron Wyden (Aug. 23, 2006), *available at* http://www.aha.org/aha/content/2006/pdf/wydenltr.pdf. During an arduous three-year investigation of the claims, the alleged irregularities—"unbundling," kickbacks, over-coding, billing for services not provided, among others—dropped away one by one until so little of substance remained that the federal government discontinued its investigation. *Id.* at 2.[9] The hospital incurred over one million dollars in fees and costs relating to the investigation. *Id.*

A clear, consistent, and strict "original source" rule, applied in tandem with the Act's other gatekeeping mechanisms, gives courts and defendants a powerful tool to identify and ward off illegitimate *qui tam* strike suits like those sometimes aimed at amici's members. The relators who

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[9] An audit of the hospital's emergency billing records revealed that a computer-programming error had resulted in the names of the treating ER physician and the hospital's former ER medical director being entered in the wrong boxes in the electronic claims form. That revelation triggered a third-party audit, which showed that all ER services had been provided by qualified physicians and had been appropriately coded—indeed, sometimes undercoded. *Id.*

clear the False Claims Act's intentionally demanding gauntlet will have had their bona fides established, while less principled relators will be winnowed out. The government, the courts, and defendants *all* would benefit from that rigorous inquiry. Only the bounty hunters would complain.

## CONCLUSION

For the foregoing reasons, as well as those in petitioner's brief, the Tenth Circuit's decision should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 26 2006
OFFICE OF THE CLERK

No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF BP AMERICA PRODUCTION COMPANY, CHEVRON CORPORATION, AND SHELL OIL COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 3

I. THE PLAIN LANGUAGE OF THE "ORIGINAL SOURCE" EXCEPTION TO THE PUBLIC DISCLOSURE BAR REQUIRES A RELATOR TO HAVE FIRSTHAND, FACTUAL KNOWLEDGE ABOUT THE INTERACTIONS BETWEEN THE DEFENDANT AND THE GOVERNMENT THAT ARE THE SUBJECT OF THE FCA SUIT ..... 6

II. THE OVERALL STRUCTURE AND PURPOSES OF THE FCA ARE CONSISTENT WITH THIS LITERAL READING OF THE "ORIGINAL SOURCE" EXCEPTION AS CONFINED TO INDIVIDUALS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF EVENTS THAT ARE THE SUBJECT OF THE FCA SUIT ..... 9

III. LIMITING THE "ORIGINAL SOURCE" PROVISION TO PERSONS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF THE EVENTS GIVING RISE TO THE FRAUD IS ESSENTIAL TO THE GATEKEEPING FUNCTION PERFORMED BY THE COURTS UNDER THE FCA ..... 12

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) ..... 12
*DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003) ..... 13
*Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611 (2005) ..... 13
*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 6, 11
*Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) ..... 13
*United States v. New York Medical College*, 252 F.3d 118 (2d Cir. 2001) ..... 7
*United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998) ..... 9
*United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) ..... 7
*United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997) ..... 7, 10
*United States ex rel. Kinney v. Stoltz*, 327 F.3d 671 (8th Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004) ..... 7
*United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 7, 8
*United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935 (6th Cir. 1997) ..... 10
*United States ex rel. Mistick PBT v. Housing Authority of City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) ..... 7
*United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 10

## TABLE OF AUTHORITIES
**(Continued)**

**Page**

*Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005) ..... 9
*Wang ex rel. United States v. FMC Corp.*, 975 F.3d 1412 (9th Cir. 1992) ..... 7, 9

**Statutes**

31 U.S.C. § 3730(a)-(d) ..... 3, 9
31 U.S.C. § 3730(b) ..... 6
31 U.S.C. § 3730(b)(2) ..... 6
31 U.S.C. § 3730(d)(1) ..... 14
31 U.S.C. § 3730(e)(4)(A) ..... 1, 6, 7
31 U.S.C. § 3730(e)(4)(B) ..... *passim*

**Legislative Materials**

H.R. Rep. No. 99-660 (1986) ..... 10
S. Rep. No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 10
132 Cong. Rec. S11238-04 (daily ed. Aug. 11, 1986) ..... 11

**Other Authorities**

2 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS, App. H (2006 Supp.) ..... 14
1 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS § 4.02[D] (2006 Supp.) ..... 14
Robert S. Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237 (1995) ..... 11, 12
United States Government Accountability Office, No. GAO-06-320R, "Information on False Claims Act Litigation" (2006), *available at* http://www.gao.gov/new.items/d06320.pdf ..... 14

## STATEMENT OF INTEREST*

*Amici*, BP America Production Company, Chevron Corporation, and Shell Oil Company, are three of the largest integrated energy companies in the world. *Amici*, or their affiliates, are engaged in every aspect of the oil and natural gas industry, including exploration and production; refining, marketing, and transportation; chemicals manufacturing and sales; and power generation. By virtue of their market position, *amici* frequently engage in contractual and other relationships with the United States government.

*Amici* have a particular interest in this case because they are among over forty energy industry defendants in a False Claims Act ("FCA") *qui tam* suit currently before the United States District Court for the Eastern District of Texas, captioned *United States ex rel. Wright, et al. v. AGIP Petroleum Co., et al.*, No. 5:03-CV-264-DF (E.D. Tex.). *Amici* and their co-defendants filed a motion to dismiss the *qui tam* relator's complaint for lack of subject matter jurisdiction under the public disclosure bar of 31 U.S.C. 3730(e)(4)(A). The defendants argued that the relator did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B), because the relator had never been employed by any of the defendants or any other major oil company, had no personal or inside knowledge of how any defendant processes, transports, or markets its gas or natural gas liquids ("NGLs") produced from federal leases, no knowledge of the federal rules and regulations governing the payment of federal royalties, and no idea how any defendant calculates or pays royalties to the federal government on gas and

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* No party other than the *amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

NGLs. In short, the relator had no firsthand, factual knowledge of any kind about the dealings between *amici*, their co-defendants, and the United States that are the subject of the pending *qui tam* suit.

The district court, however, denied the motion to dismiss. *United States ex rel. Wright v. AGIP Petroleum Co.*, No. 5:03-CV-264-DF, slip op. (E.D. Tex. Jan. 4, 2005).[1] The court concluded that the relator's background personal experience owning private gas royalty interests in private wells not on federal lands allowed him to determine that several defendants were paying him royalties based on prices below market value. *Id.* at 27-28. The court also found that the relator's experience of many years working in the industry gave him "insider knowledge of industry practice as it relates to the payment of gas royalties," *id.* at 34, and that "[f]rom this insider knowledge, Wright acquired direct and independent knowledge of the material elements of the alleged fraud in this case." *Id.* In particular, Wright's "experience . . . that [royalty owners] paid everybody on the same basis," *id.* at 29 (internal quotation marks omitted), allowed Wright to assert that if he was being underpaid on his leases, the United States likely was being underpaid in the same way. *Id.* at 29-31. For these reasons, the court concluded, the relator satisfied the "original source" requirements of 31 U.S.C. § 3730(e)(4)(B).

The *Wright* case highlights a threshold issue of substantial importance, which *amici* believe this Court should consider as it answers the question presented in the petition. The petition requires the Court to clarify the nature of the information which a relator must have to be an "original source," and to resolve a circuit split focused in part on whether that information must include knowledge of the

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[1] Given that this decision is unpublished and unavailable in electronic databases, all citations are to the slip opinion.

fraudulent acts themselves. The threshold issue raised in the *Wright* case, and which is inherent in the task of clarifying what it takes to be an "original source," is whether, at a minimum, "direct and independent knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), must be firsthand, factual knowledge by the relator *about* the dealings between the defendant and the government that make up the subject matter of the FCA lawsuit, or whether, as the *Wright* court held, theories and speculation based on a relator's experiences completely unrelated to the dealings between the defendant and the government can suffice.

## SUMMARY OF ARGUMENT

*Amici* offer this brief to support the modest proposition that, whatever the precise extent of the "original source" provision's "direct and independent knowledge" requirement may be, it is not satisfied by a person who has no firsthand, factual knowledge whatsoever of the relationship and transaction between the defendant and the government from which the underlying FCA lawsuit's claims arise.

## ARGUMENT

This Court granted certiorari to determine whether the Tenth Circuit erred by "misinterpret[ing] the statutory definition of an 'original source.'" Pet. i. Thus, the Court has undertaken the task of construing the statutory language of the "original source" requirement. That requirement, when satisfied, allows a relator to proceed with litigation under the FCA—even if the United States elects not to do so—and to receive a share of any recovery and attorneys fees. *See* 31 U.S.C. § 3730(a)-(d). As relevant here, the FCA provides that an "original source" is "an individual who has direct and independent knowledge of the information on

which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).[2]

The petition presents the Court with a split among the circuits concerning the proper interpretation of these words, and more specifically a circuit split on the question of what information a relator must know and disclose to the government. Pet. 13-14. The Third and Eleventh Circuits require knowledge of the fraudulent statement; the Eighth and D.C. Circuits require knowledge sufficient to show that the statement is false; the Ninth Circuit evaluates whether the relator's information proximately caused the discovery of the fraud; and the Tenth Circuit, in this case, requires only that a relator know background information "underlying or supporting" his supposition that a defendant might have engaged in fraud, even if the relator pursues a different theory at trial. *See* Pet. 5, 14-15; Pet. App. 21a (holding that § 3730(e)(4) merely requires relators to know facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint").

In determining the character of the "direct and independent knowledge" that an "original source" must have, there is a threshold question of whether at a minimum—and however the Court may ultimately resolve the question whether knowledge of the fraud itself is required—the "direct and independent knowledge" that a relator must possess must be firsthand, factual information about the dealings between the government and defendant that are the subject matter of the FCA suit. *Amici* contend that it is not enough for a would-be relator with no direct knowledge about the facts of the allegedly fraudulent relationship or events set out in the complaint to offer

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[2] The statute also requires that a relator must have "voluntarily provided the information to the government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

speculation or theories to the effect that government fraud might be afoot. Nor is it enough that such speculation or "tips" to the government rest on the relator's own firsthand experience, where that experience has nothing to do with the interactions between the defendant and the government that are the subject matter of the FCA suit.

This requirement of firsthand, factual knowledge about the events that are the subject matter of the suit—and thus of the relevant dealings between the defendant and the government—is fundamental. Moreover, it logically precedes the question of whether this factual knowledge must extend to the fraud itself, or may suffice if it does not.

As set forth below, *amici*'s assertion that the statute's "original source" exception reserves that special status to persons with "direct and independent knowledge" about the facts of the case at issue is compelled by the plain meaning of the provision itself. Honoring that plain meaning is, in turn, of critical importance in realizing the statute's dual objectives of creating incentives so that genuine "whistleblowers" come forward, while denying those incentives to gold diggers who have no firsthand, factual knowledge of the events at issue, but try nonetheless to seek bounties through lawsuits brought in the name of the United States. Failure to clarify this threshold requirement of the "original source" rule would severely impair the ability of lower courts to serve as gatekeepers of FCA litigation, and leave unresolved an important question of federal court jurisdiction.

## I. THE PLAIN LANGUAGE OF THE "ORIGINAL SOURCE" EXCEPTION TO THE PUBLIC DISCLOSURE BAR REQUIRES A RELATOR TO HAVE FIRSTHAND, FACTUAL KNOWLEDGE ABOUT THE INTERACTIONS BETWEEN THE DEFENDANT AND THE GOVERNMENT THAT ARE THE SUBJECT OF THE FCA SUIT

The FCA empowers individuals to originate and pursue litigation in the name of the United States alleging fraudulent conduct against it. *See* 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of § 3729 for the person and for the United States Government."); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941 (1997). It contains complex procedures to ensure that the government is afforded an opportunity to review and, where it wishes to do so, take control of any such litigation. *See* 31 U.S.C. § 3730(b)(2) (requiring, among other things, that a relator file a complaint under seal "for at least 60 days" and prepare and serve on the government a "written disclosure of substantially all material evidence and information the person possesses"). And the FCA also contains a flat bar to jurisdiction over a relator's action where there has been a public "disclosure of allegations or transactions" in various judicial, administrative, congressional, or other public fora. 31 U.S.C. § 3730(e)(4)(A). But in the provision whose precise meaning is at issue in this case, there is a limited exception to this absolute bar for persons who are "original source[s]" of the "information on which the allegations are based," who are allowed to proceed under the FCA notwithstanding a previous public disclosure. 31 U.S.C. § 3730(e)(4)(B).

The language of § 3703(e)(4)(B), while less than elegant, is clear beyond peradventure in establishing that, to qualify as an "original source," a relator must have firsthand, factual knowledge about the dealings between the defendant and the government that are the subject matter of the FCA suit. For, § 3730(e)(4)(B) defines an "'original source' . . . [as] an

individual who has direct and independent knowledge of the information on which the allegations are based." *Id.*

The public disclosure bar to jurisdiction over an FCA suit against the defendant is only triggered when the suit is "based upon the public disclosure of allegations or transactions" in one of various enumerated proceedings. 31 U.S.C. § 3730(e)(4)(A). In creating in the next sentence an "original source" exception, Congress was clearly saying that an "original source" must have the specified knowledge concerning "allegations" that were publicly disclosed. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("'allegations' referred to in subparagraph (B) can only mean those allegations publicly disclosed, since those are the only allegations mentioned at all in section 3730(e)(4)"); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (same). From the context, it is clear that these are the factual allegations against the defendant that are involved in the lawsuit. *See United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (holding that a relator must be the "'source of the core information' upon which the *qui tam* complaint is based") (citation omitted); *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999) (Alito, J.) (same).

Furthermore, the requirement of "direct and independent knowledge" relating to those allegations is a requirement of firsthand knowledge. *See, e.g., United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) ("a relator has direct knowledge when he sees it with his own eyes"), *cert. denied*, 540 U.S. 1105 (2004); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (same). Thus, it is not enough for a relator to bring a lawsuit predicated entirely on secondhand and thirdhand reports from others of the events that are the subject matter of the suit. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) ("A person who learns

secondhand of the allegations of fraud does not have 'direct' knowledge within the meaning of [the FCA]."); *Laird*, 336 F.3d at 355 (same).

The split in the circuits that brought this case before the Court relates essentially to how much *firsthand* knowledge of the *allegations against the defendant* a relator must have to be an "original source." Must the relator be specifically aware of the fraud itself, or will some lesser quantum and character of firsthand knowledge—perhaps even just background information about the relationship between the defendant and the United States—suffice? While Petitioners and other *amici* offer strong reasons for concluding that the firsthand knowledge should be required to pertain to the gravamen of the wrong—that is the fraud itself—*amici* in this brief confine themselves to highlighting a more modest, but critically important point: One can not possibly have "direct and independent knowledge" of the lawsuit's "allegations" against the defendant unless he has *some* firsthand knowledge of the facts relating to the dealings between the defendant and the government that is the subject of the suit.

There is no reasonable contrary interpretation of the "original source" exception. To read "allegations" as a term divorced from that baseline requirement of firsthand, factual knowledge strips the term of meaning and causes the "original source" exception to swallow the public disclosure bar. Yet this is precisely what some courts—including the Tenth Circuit in the *Rockwell* case at bar and the district court in *amici*'s *Wright* case—have done. They have interpreted the exception so broadly as to allow mere speculation or general industry background knowledge to trigger the exception, even though the putative relator admittedly has no firsthand, factual knowledge whatsoever of the specific relationship or transactions with the government out of which the alleged fraud arose. The plain language of the statute clearly forecloses such an interpretation, and *amici* respectfully request that the Court

affirm that fundamental point in order to prevent further confusion (and unnecessary litigation and expense) in the lower courts.

## II. THE OVERALL STRUCTURE AND PURPOSES OF THE FCA ARE CONSISTENT WITH THIS LITERAL READING OF THE "ORIGINAL SOURCE" EXCEPTION AS CONFINED TO INDIVIDUALS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF EVENTS THAT ARE THE SUBJECT OF THE FCA SUIT

The FCA's *qui tam* provisions are animated by two competing concerns. On the one hand, Congress has promoted private citizen involvement by establishing provisions which enable "whistleblowers" to help the government ferret out fraud. *See, e.g., United States ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539 (9th Cir. 1998) ("Insiders who have no duty to disclose fraud, *i.e.*, who do so voluntarily, should be encouraged to take 'significant personal risks to bring such wrong-doing to light,' and should be rewarded for doing so."); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005) (same).

On the other hand, Congress has sought to prevent opportunistic relators who add nothing to the exposure of the government fraud from joining in the government's recovery. *See Wang*, 975 F.2d at 1419 ("*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot.").

The statute's provisions authorizing and creating substantial incentives for whistleblower lawsuits—including authorizing go-it-alone litigation in the name of the United States, and recovery of a substantial share of any award and attorneys fees—are well-known and do not require detailed discussion here. *See* 31 U.S.C. § 3730(a)-(d). But it is worth noting that the affirmative purpose of these provisions is not

an unqualified one to offer this opportunity and incentive to all litigation entrepreneurs wishing to try their hand at bringing a claim for fraud allegedly perpetrated against the United States. Even before the addition of the present public disclosure bar's "original source" provision, during the consideration of the legislation in 1986, the legislative history made clear that it was persons with knowledge—genuine "whistleblowers"—not speculators about possible fraud, whom the statute sought to encourage. "The proposed legislation seeks . . . to encourage any individual *knowing of Government fraud* to bring *that information* forward." H.R. Rep. No. 99-660, at 22 (1986); S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67 (emphases added).

The public disclosure bar of § 3730(e)(4), coupled with its "original source" exception, attempt to balance the goals of "avoidance of parasitism and encouragement of legitimate citizen enforcement actions." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). There is usually no need for a private person to "blow the whistle" once the substance of the case against a defendant has been publicly disclosed, and thus the general rule is that jurisdiction is denied once a public disclosure has occurred. *See, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *Findley*, 105 F.3d at 690. The public disclosure bar thus reflects the conclusion that the goals of the FCA are largely achieved when the factual information of a defendant's misconduct has been brought to light by a public disclosure.

The "original source" exception to this bar recognizes, most obviously, that the statute's very objective of encouraging people possessing factual information about government fraud to come forward would be frustrated if the public disclosure bar meant that the person who made the disclosure possible lost any claim to rights under the FCA. Sometimes a relator is the source of the information that is

publicly disclosed, thus revealing the fraud at issue. Where that occurs, a rule which would deny the "whistleblower" any rights to participate under the FCA could cause the relator to be less than forthright in his disclosures, or to avoid the whole risky enterprise of acting as a "whistleblower" in the first place.

In pursuit of these concerns, then, Congress adopted the "original source" provision as a limited exception to the public disclosure bar.[3] As the principal Senate author of this provision noted, "[t]his amendment seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual with no direct and independent knowledge of the information or who had not been the original source to the entity that disclosed the allegations." 132 Cong. Rec. S11238-04, S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley); *see also* Robert S. Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions under the False Claims Act*, 24 PUB. CONT. L.J. 237, 280-81 (1995) (noting that under Congress's "original source" directive a "relator who provides the Government with information prior to its publication should be rewarded for incurring the risk associated with breaking the conspiracy of silence, while the relator who incurs no risk in disclosing information because it is already public is appropriately penalized because his action does not benefit the Government").

If both of Congress's goals are to be realized in litigation under the FCA, there must be effective enforcement of the jurisdictional limitation embodied in the public disclosure

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[3] As this Court has explained, "[p]rior to 1986, such suits were barred if the information on which they were based was already in the Government's possession." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941 (1997).

bar and "original source" exception. Obviously, then, the "original source" provision must be given a definite meaning capable of application by the courts, and it must be the one conferred by the words Congress used. As shown above, those words, while not elegant, are perfectly clear in their meaning in limiting "original source[s]" to participants or observers who possess at a minimum some firsthand, factual knowledge of the events surrounding the fraud. This meaning is entirely sensible, since such people are the ones who can provide the government assistance in investigating and prosecuting the fraud (for example, by acting as witnesses at trial) in a way that possessors of secondhand information cannot. *See* Salcido, *supra*, at 280-81 (noting that relators with direct information are likely witnesses, while those with only indirect, *i.e.*, hearsay information, are less likely to be valuable witnesses).[4]

## III. LIMITING THE "ORIGINAL SOURCE" PROVISION TO PERSONS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF THE EVENTS GIVING RISE TO THE FRAUD IS ESSENTIAL TO THE GATEKEEPING FUNCTION PERFORMED BY THE COURTS UNDER THE FCA

As this Court has emphasized, "[c]ourts and litigants are best served by [a] bright-line rule" in matters involving jurisdiction. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). "[C]lear, bright-line [jurisdictional] rule[s] . . . ensure[] that judges and litigants will not waste

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[4] This interpretation is also most likely to bring "wrongdoing to light" since, by barring those who come forward only *after* public disclosure of possible FCA violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time.

their resources determining the extent of federal subject-matter jurisdiction." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring). The reason for this, as then-Judge Roberts has recently emphasized, is that "bright-line rules . . . can be applied to determine jurisdiction with a fair degree of certainty from the outset." *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003) (Roberts, J.). And courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005). In light of this, the Court must clarify that the "original source" provision is not satisfied by a person who has no firsthand, factual knowledge whatsoever of the relationship and transaction between the defendant and the United States out of which the FCA lawsuit's claims arise. This clarification is urgently needed so that the lower courts faithfully implement the gatekeeping function that Congress has mandated through the statutory language.

As shown above, in enacting the public disclosure bar and the "original source" exception, Congress clearly intended to provide "whistleblowers" with meaningful incentives to come forward while also erecting a jurisdictional barrier against opportunistic relators. In creating this jurisdictional bar, Congress enlisted the federal courts as gatekeepers to screen out unworthy *qui tam* actions and advance the purposes of the FCA. Unfortunately, confusion over the "original source" exception serves to thwart the courts' gatekeeping function by allowing opportunistic *qui tam* suits to proceed at great expense to litigants, the courts, and, ultimately, the government.

Clear guidance anchored in the statutory language is important to the courts' gatekeeping function because the FCA is frequently litigated. Since Congress amended the Act in 1986 to allow a relator to proceed even after a public disclosure, the federal courts have entertained over 5000 *qui tam* suits. United States Government Accountability Office,

No. GAO-06-320R, "Information on False Claims Act Litigation," at 25 (2006), *available at* http://www.gao.gov/new.items/d06320.pdf (last visited Oct. 26, 2006). The number of *qui tam* cases filed each year has increased dramatically from a low of 33 in 1987 to a current estimated rate of 300 to 500 each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep't of Justice, Sept. 30, 2002), *reprinted in* 2 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS, at App. H (2006 Supp.). The "original source" question arises in a significant percentage of these cases and "has become (along with 'public disclosure') the most litigated—and confused—issue under the *qui tam* provisions." 1 BOESE, *supra*, § 4.02[D].

Courts that misapply the "original source" exception undermine the judicial gatekeeping function, thereby eviscerating Congress's intent with respect to the FCA. Perhaps the most significant consequence of the existing confusion over the "original source" exception is the possibility of monetary awards to opportunistic relators, which can be quite substantial and come directly out of the monies ultimately awarded to the government. *See* 31 U.S.C. § 3730(d)(1).

Furthermore, judicial uncertainty over the original source exception imposes substantial costs on litigants and the courts aside from the windfalls described. While the extent of resources thus wasted is not easily determined, when one considers the precious time of the courts, the commitment of government resources to coordinate with counsel of improper relators and to monitor suits in which the government has not joined, and of course the substantial costs of defending against these high-exposure cases, the amount at issue is quite substantial.

For this reason, as well, in its consideration of the matter before it and of the precise character of knowledge required to be an "original source," the Court should make clear that

the "original source" provision requires firsthand, factual knowledge of events that are the subject of the FCA suit.

## CONCLUSION

For these reasons, *amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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October 26, 2006

4660

No. 05-1272

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND
BOEING NORTH AMERICAN, INC.,
*Petitioners*,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF
AMERICA EX REL. JAMES S. STONE,
*Respondents*.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 6 |
| I. THE ORIGINAL SOURCE EXCEPTION SHOULD BE INTERPRETED CONSISTENTLY WITH THE PURPOSE OF THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE JURISDICTIONAL BAR, WHICH IS TO RESTRICT *QUI TAM* SUITS TO TRUE WHISTLEBLOWERS | 6 |
| II. TO QUALIFY AS AN "ORIGINAL SOURCE," A *QUI TAM* RELATOR MUST HAVE FIRST-HAND KNOWLEDGE OF ALL FACTS THAT MUST BE PLEADED TO SATISFY THE PARTICULARITY REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE RULE 9(b) | 14 |
| A. Rule 9(b) Requires Relators To Plead The Details Of The Alleged False Claim | 16 |
| B. Rule 9(b) And The Original Source Requirement Share The Same Goals | 18 |
| C. A Relator Cannot Escape The Original Source Requirement By Amending The Complaint | 21 |

TABLE OF CONTENTS—Continued

Page

III. AN "ORIGINAL SOURCE" MUST HAVE BEEN THE SOURCE OF THE PUBLIC DISCLOSURE AND MUST HAVE PROMPTLY NOTIFIED THE GOVERNMENT BEFORE FILING SUIT ..... 25

CONCLUSION ..... 29

# TABLE OF AUTHORITIES

CASES Page

*Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001) ..... 17, 19

*Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005), *cert. denied*, 75 U.S.L.W. 3163 (U.S. Oct. 2, 2006) (No. 05-1288)..... 16, 21

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) .....6, 8, 11, 12

*Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002) ..... 14, 20

*Mistick PBT v. Housing Auth. of the City of Pittsburg*, 186 F.3d 376 (3d Cir. 1999) ..... *passim*

*Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) ..... 11

*Seal 1 v. Seal A*, 255 F.3d 1154 (9th Cir. 2001).....23, 24

*United States ex rel. Ackley v. International Business Machines Corp.*, 76 F.Supp.2d 654 (D. Md. 1999) ..... 22

*United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516 (9th Cir. 1999) ..... 19

*United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993) ..... 23, 24

*United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002) ..... 18

TABLE OF AUTHORITIES—Continued

Page

*United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010 (E.D. Va. 1995) ..... 19, 20, 21

*United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) ..... 14

*United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) ..... 26

*United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997) ..... *passim*

*United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601 (7th Cir. 2005) ..... 17

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) ..... 15

*United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) ..... 23

*United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3169 (U.S. Oct. 2, 2006) (No. 06-12) ..... 16

*United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004) ..... 16, 17, 18, 21

*United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271 (10th Cir. 2001) ..... 27

*United States ex rel. Kinney v. Stoltz*, 327 F.3d 671 (8th Cir. 2003) ..... 14, 20, 22

TABLE OF AUTHORITIES—Continued

Page

*United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 15

*United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995). 12

*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) ..... 7

*United States ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935 (6th Cir. 1997).. 28

*United States ex rel. Merena v. Smithkline Beecham Corp.*, 114 F.Supp.2d 352 (E.D. Pa. 2000) ..... 13

*United States ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) ..... 18

*United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994) ..... 10, 29

*United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 7, 8, 20

*United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 7, 8, 9

*United Stated ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) ..... 9

*United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997) ..... 16

*United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) ..... 8

TABLE OF AUTHORITIES—Continued

Page

*United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) ..... 9, 10, 26, 27

*United States v. Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006) ..... 28

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) ..... 3

*Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ..... 9, 25, 26

*Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003) ..... 17

STATUTES, REGULATIONS, AND RULES

31 U.S.C. § 3730(b)(2) ..... 27

31 U.S.C. § 3730(e)(4)(A) ..... *passim*

31 U.S.C. § 3730(e)(4)(B) ..... *passim*

48 C.F.R. § 31.205-33 ..... 13

48 C.F.R. § 31.205-47(c)(2) ..... 13

Federal Rule of Civil Procedure 9(b) ..... *passim*

Federal Rule of Civil Procedure 11 ..... 19

Federal Rule of Civil Procedure 12(b)(6) ..... 17

MISCELLANEOUS

Memorandum Opinion For The Attorney General, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel 207 (1989), 1989 WL 595854 ..... 11, 12

TABLE OF AUTHORITIES—Continued

Page

Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992) ..... 12

Transcript of Oral Argument, *Cook County v. United States ex rel. Chandler*, No. 01-1572, 2003 WL 145399 (U.S. Jan. 14, 2003) ..... 11

U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* (2006) ..... 11, 13

William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201 (1998) ..... 12, 13

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# Supreme Court of the United States

No. 05-1272

ROCKWELL INTERNATIONAL CORP. AND
BOEING NORTH AMERICAN, INC.,
*Petitioners*,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF
AMERICA EX REL. JAMES S. STONE,
*Respondents.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

## BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

## INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Respondents, and the documents confirming consent have been submitted to the Clerk's office. Counsel for Petitioners has submitted a blanket letter of consent to the Clerk's office.

of business organizations. It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business. This is such a case. The proliferation of parasitic, vexatious, or otherwise unmeritorious *qui tam* suits filed under the 1986 False Claims Act ("FCA") in the name of the United States by opportunistic *qui tam* relators threatens the legitimate business activities of every federal government contractor, health care provider and administrator, and federal grant recipient in the nation.

The **Pharmaceutical Care Management Association** ("PCMA") is the national association representing pharmacy benefit managers ("PBMs"), which administer prescription drug benefits for more than 200 million Americans with health care coverage. That coverage is provided through small businesses, Fortune 500 employers, health insurers, and labor unions, as well as government programs like Medicare. PBMs work to drive down the cost of prescription drugs through proven cost-containment tools. Those tools include negotiating with drug manufacturers to obtain rebates on plan members' drug purchases; establishing networks of both retail and mail-order pharmacies to allow consumers access to discount drugs; working with plan sponsors and insurers to design formularies of preferred drug products as well as benefit packages; and administering "drug utilization review" programs designed to monitor and deter purchases of dangerous drug combinations and questionable doses. Like other components of the nation's health care system, PBMs have been subjected to unwarranted *qui tam* suits.

The Chamber and PCMA are submitting this *amicus curiae* brief because they believe that strict construction and proper application of the "original source" exception of 31 U.S.C.

§ 3730(e)(4)(A) & (B) is crucial to achieving the objectives underlying the FCA's jurisdictional bar against *qui tam* suits that otherwise are based upon publicly disclosed information.[2]

## SUMMARY OF ARGUMENT

Congress has struggled with the False Claims Act's *qui tam* provisions throughout much of their troubled 143-year history. The statute's goal of encouraging and enabling private citizens to aid in recovery of funds fraudulently obtained from the Federal Government has remained more or less unchanged. But in failed efforts to accomplish that objective, Congress has repeatedly rewritten the statute, primarily in response to this Court's decisions, either by closing the court house doors too tightly, or opening them too widely, to *qui tam* relators who seek financial rewards for pursuing alleged fraudulent activity against the United States. Congress' most recent overhaul of the FCA, the 1986 False Claims Amendments Act, and specifically the amended jurisdictional requirements for filing and maintaining *qui tam* suits, are the subject of this appeal.

Attempting to achieve, at last, the correct balance between encouraging *qui tam* suits by bona fide whistleblowers and sparing the courts, the Executive Branch, and industry of parasitic, vindictive, or unwarranted false claims litigation, the 1986 amendments expressly bar *qui tam* actions that are based upon publicly disclosed information, except where the relator is "an original source of the information." 31 U.S.C.

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[2] In support of the petition for certiorari, the Chamber filed an *amicus* brief urging the Court to address the question, reserved in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000), of whether the 1986 *qui tam* provisions violate the Appointments and Take Care clauses of Article II of the Constitution. Although the Court has indicated that it will not be deciding that question here, the Chamber continues to believe that the Article II question is an important issue that the Court should resolve in a future case.

§ 3730(e)(4)(A). As the petition for certiorari explained, however, Congress' convoluted and imprecise effort to exempt and define an "original source," *id.* § 3730(e)(4)(A) & (B), has resulted in sharp disagreements among the lower courts regarding the exact meaning and proper application of the original source exception to the statute's public disclosure jurisdictional bar.

Unfortunately, some lower courts have erred on the side of construing the meaning of original source too liberally. Coupled with the absence of bright line rules in the vague, ambiguous, poorly structured language of the 1986 *qui tam* provisions, the lack of clear, uniform guidance from the lower courts regarding the precise circumstances under which an individual may or may not file and pursue a *qui tam* suit has hindered rather than facilitated congressional intent. This lack of clarity has skewed instead of achieved the balance that Congress sought to establish and maintain. Indeed, the 1986 amendments and permissive lower court interpretations of the original source exception have fostered development of a seemingly unbridled *qui tam* litigation industry whose opportunistic bounty hunter relators file suits, for and in the name of the United States, against virtually any potentially lucrative health care provider or federal government contractor that they choose to target.

By resolving the following two questions arising under the statutory definition of original source, 31 U.S.C. § 3730(e)(4)(B), the Court can provide an interpretation that is consistent with the goal of permitting suits brought only by true (i.e., legitimate) whistleblowers: (i) What constitutes "direct and independent knowledge of the information on which the allegations are based?" and (ii) What constitutes a sufficient and timely voluntary disclosure of the information by the relator?

As to the first question, *amici* maintain that the test for determining the sufficiency of the relator's "direct" knowl-

edge should be based upon Federal Rule of Civil Procedure 9(b), which establishes the applicable standard of particularity for pleading any fraud claim. The standard derived from Rule 9(b), as it has been applied to *qui tam* complaints, would require the relator to have first-hand knowledge of the facts that are required to be pleaded concerning the alleged wrongdoing—the "who, what, when, where and how" of the fraud. This rule also would effectively preclude the all-too-frequent practice of a relator amending his *qui tam* complaint by adding entirely new allegations that are based upon information which the Government uncovered during its investigation of the relator's original complaint.

Regarding the second question—the disclosure requirements—*amici* urge the Court to require that the relator be the source to the entity that made the public disclosure. The lower courts which have adopted this rule correctly have found, based upon congressional intent as well as a common sense application of the term "original source," that only the person who brings the alleged wrongdoing to light should qualify as an original source. In addition, the statute requires that the relator have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). While a few courts have held that a relator can satisfy this requirement by submitting his disclosure statement to the Government concurrently with filing of his *qui tam* action, the Court should confirm the rule adopted by most courts, which requires the relator to demonstrate that he notified the Government of the alleged wrongdoing promptly upon learning about it.

## ARGUMENT

### I. THE ORIGINAL SOURCE EXCEPTION SHOULD BE INTERPRETED CONSISTENTLY WITH THE PURPOSE OF THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE JURISDICTIONAL BAR, WHICH IS TO RESTRICT *QUI TAM* SUITS TO TRUE WHISTLEBLOWERS

The issue in this appeal—the meaning and proper application of the "original source" jurisdictional requirement—is an important threshold question in virtually every FCA *qui tam* action based upon publicly disclosed information. As amended in 1986, the FCA expressly bars "an action . . . based upon the public disclosure of allegations or transactions . . . *unless* the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added); *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) ("Congress amended the FCA in 1986 . . . to permit *qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source."). Thus, the statutory provision at the heart of this case is not only a jurisdictional requirement; it actually functions as "the 'original source' *exception* to the public disclosure bar." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997) (emphasis added). That exception defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [a *qui tam* action] which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

The link between the original source exception and the public disclosure jurisdictional bar is far more than textual.

By enacting the 1986 amendments, and specifically the public disclosure bar and its original source exception, "Congress . . . sought to achieve 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own.'" *Findley*, 105 F.3d at 680 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). The Court should interpret the original source exception in a manner that helps to achieve and maintain the critical balance that Congress sought. Indeed, the lower courts' difficulties interpreting and applying the confusingly structured, ambiguously worded original source exception and definition is all the more reason why the Court should use congressional intent as a guidepost.

"The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *Springfield Terminal Ry.*, 14 F.3d at 651. Originally enacted in 1863 to counter Civil War contractor fraud, the FCA "contained a broad *qui tam* provision allowing any person to prosecute a claim on behalf of the United States against any person who knowingly submitted a false claim to the Government." *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991). Eighty years later, during World War II, "[*q*]*ui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations." *Findley*, 105 F.3d at 679-80. The Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), holding that a *qui tam* relator could bring an action simply by copying information from a government criminal indictment, "spotlighted the pitfalls of the overly generous *qui tam* provisions then in effect." *Springfield Terminal Ry.*, 14 F.3d

at 649. Congress promptly reacted to *Marcus* by amending the FCA "to prevent such piggy-back lawsuits." *Findley*, 105 F.3d at 680.

Shifting to the opposite extreme, the FCA, as amended in 1943, "required a district court to 'dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought.'" *Hughes*, 520 U.S. at 945 (quoting 31 U.S.C. § 3730(b)(4) (1982 ed.) (superseded)). "This language was broadly construed by courts to bar jurisdiction whenever the Government possessed the information on which the claim was brought, even when the information had been provided to the Government by the *qui tam* plaintiff before the filing of the claim." *Stinson*, 944 F.2d at 1153-54; *see Hughes*, 520 U.S. at 951 ("disclosure of information about the claim to the Government constituted a full defense to a *qui tam* action"). According to the D.C. Circuit, "[t]he case of *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) [holding that the 1943 version of the FCA barred the State of Wisconsin from pursuing a *qui tam* civil suit for Medicaid fraud because the State already had reported the fraud to the Federal Government] marked the nadir of the *qui tam* action." *Springfield Terminal Ry*, 14 F.3d at 650. After the National Association of Attorneys General "adopted a resolution strongly urging Congress 'to rectify the unfortunate result' of [the *Dean*] decision," *Stinson*, 944 F.3d at 1154 (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S.C.A.A.N. 5278), Congress enacted the False Claims Amendments Act of 1986.

The 1986 amendments, which include both the § 3730(e)(4) public disclosure jurisdictional bar and original source exception, represent a "congressional effort to reconcile avoidance of parasitism and encouragement of legitimate citizen enforcement actions." *Springfield Terminal Ry*, 14 F.3d at 651; *see also Findley*, 105 F.3d at 680 ("After ricocheting

between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress again sought to achieve 'the golden mean.'") (quoting *Springfield Terminal Ry*, 14 F.3d at 649); *Stinson*, 944 F.2d at 1154 (Congress' "principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision . . . and the restrictiveness of the post-1943 cases, which precluded suit even by original sources."); *ibid.* (quoting *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (the 1986 FCA amendments "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits" (statement of Sen. Grassley)).

As amended, the FCA requires a *qui tam* relator to "be a true 'whistleblower'; therefore, he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed." *United Stated ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994); *see* Pet. App. 13a (acknowledging "the False Claims Act's goal of preventing parasitic lawsuits based on information discovered by others") (internal quotation marks omitted). In other words, unlike Respondent Stone, "[a] 'whistleblower' sounds the alarm; he does not echo it." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Thus, "the public disclosure bar . . . limits *qui tam* jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware." *Findley*, 105 F.3d at 678; *see also United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999) ("Congress intended that the courts not be troubled by persons who wish to capitalize on others' discovery of frauds to the exposure of which they themselves have in no way contributed.").

But Congress failed to express its intent with sufficient clarity and precision in the text of 31 U.S.C. § 3730(3)(4)(A) & (B). *See Mistick PBT v. Housing Auth. of the City of Pittsburg*, 186 F.3d 376, 387 (3d Cir. 1999) (then Circuit Judge Alito explaining that "[s]ection 3730(e)(4)(A) does not reflect careful drafting or a precise use of language"). These textual deficiencies have led to loose judicial interpretations of the original source exception, such as the Tenth Circuit's skewed opinion below, which have interfered with accomplishment of the 1986 amendments' dual objective of both encouraging and limiting *qui tam* suits to actions filed by true whistleblowers.[3]

Indeed, the 1986 amendments, fueled by the temptation of a 15%–30% share of any recovery, have engendered a still booming *qui tam* litigation industry for voracious bounty hunters (including disgruntled former employees) and their counsel. *See generally* Memorandum Opinion For The

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[3] The original source exception comes into play, where, as here, the relator's action is "based upon" the public disclosure. 31 U.S.C. § 3730(e)(4)(A). The majority of circuits have correctly held that "based upon" simply means "supported by" or "substantially similar to" the public disclosure. *See Mistick*, 186 F.3d at 386 (collecting cases). The Fourth Circuit has held, however, that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *see also Bank of Farmington*, 166 F.3d at 863-64 (Seventh Circuit opinion adopting *Siller*). Under this minority view, a relator can avoid having to demonstrate that he is an original source merely by showing that he did not derive his allegations from the public disclosure. In *Mistick*, Judge Alito, noting that lack of precision in the term "based upon," agreed with the rationale expressed by the majority of the circuits that if "based upon" meant "derived from," "it would render the 'original source' exception largely superfluous." *Mistick*, 186 F.3d at 386 (citing *Findley*, 105 F.3d at 683). Thus *amici* urge the Court to resolve the issue by endorsing the view of the majority of the circuits.

Attorney General, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 U.S. Op. Off. Legal Counsel 207, 209 (1989), 1989 WL 595854 (prepared by Assistant Attorney General William P. Barr, Office of Legal Counsel) ("Barr Mem.") ("The 1986 Amendments have . . . spawned the formation of full-time 'bounty-hunting' groups — ersatz departments of justice — that go about prosecuting civil fraud actions in the name of the United States."). This *qui tam* feeding frenzy, which continues unabated against both the health care industry and government contractors, is not surprising in view of the Court's observation in *Hughes* that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes*, 520 U.S. at 949. *See also* Transcript of Oral Argument at 29, *Cook County v. United States ex rel. Chandler*, No. 01-1572, 2003 WL 145399 (U.S. Jan. 14, 2003) (Justice Scalia observing that *qui tam* actions "are an invitation to shakedowns").

The facts compiled by the Government speak for themselves. Between Fiscal Years 1987 and 2005, more than 5,100 *qui tam* actions were filed, and the number of *qui tam* cases has continued to increase as a proportion of total FCA cases. *See* U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* 25 (2006). Following investigation, however, the Department of Justice has elected to pursue only a small percentage of these *qui tam* suits, *id.* at 29, and sums recovered in cases where the Department has declined to intervene represent less than 5% of recoveries from all *qui tam* suits and less than 3% of total FCA recoveries, *id.* at 1, 5, 35. Thus, any notion that strictly construing the original source jurisdictional requirement "would result in the disablement of an effective law enforcement tool is utterly without support." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) (commenting on *qui tam* statistics and the lack of impact on

FCA enforcement if the *qui tam* provisions were declared unconstitutional in cases where the Government does not intervene).

In reality, unmeritorious *qui tam* actions "waste defendants' and the courts' resources," as well as those of the Justice Department and supposedly defrauded federal agencies. Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992). *See, e.g., Hughes*, 520 U.S. at 943 n.1 (noting that the Government ultimately reversed its preliminary determination that it had been improperly charged and concluded that the defense contractor defendant "actually benefited" the Government financially); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) (affirming dismissal of *qui tam* suit against defense contractor where, based in part on trial testimony of numerous Air Force witnesses, the quality of defendant's drawings met its contractual obligations and the Air Force's expectations). But the *qui tam* industry continues undeterred. *See generally* William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 232 (1998) ("That the purchasing agencies or the Department of Justice regard such a suit as ill-conceived does not impede the initiation and prosecution of such cases by relators."). Because "[r]elators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists," Barr Mem. at 220, unwarranted *qui tam* actions also can have a chilling effect on the working relationships between government agencies and their contractors. *See* Kovacic, *supra* at 239 (*qui tam* provisions are "a serious impediment").

The fact that "[i]n many instances, the costs of defending against unsuccessful *qui tam* suits are recoverable against

the government" under various contract clauses further diminishes whatever economic benefit the Government derives from the majority of *qui tam* suits. *Id.* at 201; *see* 48 C.F.R. § 31.205-47(c)(2) (providing for reimbursement by the Government of defendant's legal costs); *id.* § 31.205-33 (allowability of legal and consultant fees). Yet, the filing of *qui tam* suits, including parasitic, abusive, or otherwise unmeritorious suits that defendants settle to avoid harassment, adverse publicity, strained relations with the Government, and litigation burdens and costs, remains a particularly lucrative business: Between 1986 and 2005, more than $1.6 billion was awarded to *qui tam* relators and their attorneys. GAO at 5.

The foregoing realities of contemporary *qui tam* litigation underscore the need for the Court to rein in unwarranted *qui tam* actions by strictly construing the original source exception in a manner consistent with congressional intent. More specifically, prospective *qui tam* litigants (and their counsel), as well as the lower courts, would substantially benefit from bright line rules that are consistent with Congress' goal of limiting *qui tam* actions to suits filed by true whistleblowers who genuinely aid in the enforcement of the FCA. *See generally United States ex rel. Merena v. Smithkline Beecham Corp.*, 114 F.Supp.2d 352, 372 (E.D. Pa. 2000) (urging federal appellate courts to "answer at least some of the knotty questions that will continue to crop up [because] [i]t is unfair to litigants, both the government, defendants and qui tam relators to be needlessly unsure of the applicable law").

## II. TO QUALIFY AS AN "ORIGINAL SOURCE," A *QUI TAM* RELATOR MUST HAVE FIRST-HAND KNOWLEDGE OF ALL FACTS THAT MUST BE PLEADED TO SATISFY THE PARTICULARITY REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE RULE 9(b)

Under the first part of the original source definition, courts must determine whether a relator has "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). "Direct" means that the relator's knowledge is first-hand, *i.e.*, that "he sees it with his own eyes." *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003); *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) ("a person who learns secondhand of allegations of fraud does not have 'direct' knowledge"). "Independent" knowledge means "knowledge not derived from the public disclosure." *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002); *Mistick*, 186 F.3d at 389 ("a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information").

The primary question at hand is how much information must the relator possess. As noted in the petition for certiorari, lower courts have applied different standards as to the nature and quantum of knowledge a relator must have to qualify as an original source. The Tenth Circuit's decision below, holding that a relator need only possess one piece of background information underlying a speculative fraud claim, represents the loosest interpretation. Affording original source status to a relator who did not possess the particular information necessary to state a fraud cause of action until he obtained additional information from someone else's public disclosure significantly diminishes the goal of barring para-

sitic *qui tam* actions. Accordingly, in measuring the extent of the relator's knowledge of the allegations in the complaint, the Court should require the relator to prove knowledge of all of the particular facts which must be pleaded in order for the complaint to satisfy the requirements of Federal Rule of Civil Procedure 9(b) ("In all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity.").[4]

Use of the Rule 9(b) standard is consistent with the goal of barring parasitic actions. This standard would preclude a relator from filing an initial complaint based upon a slim thread of mere suspicion and then filing an amended complaint containing entirely new allegations that were derived from the Government's investigation of the relator's initial complaint. This common practice enables a relator to piggyback onto allegations uncovered by the Government merely because the relator "triggered" an unrelated investigation. This Court should articulate a rule that finally puts an end to this type of classic parasitic action. Along the same

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[4] Courts also are divided on the meaning of the phrase "the information on which the allegations are based" in the original source definition, 31 U.S.C. § 3730(e)(4)(B). Some courts assess the extent of the relator's knowledge merely as to the publicly disclosed information, while others look to the relator's knowledge of the allegations in the complaint. *See United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (noting the various circuit splits). For the reasons discussed in this brief, *amici* maintain that a plain reading of the phrase, as well as the underlying purpose of the original source provision, supports the view expressed by the Tenth Circuit in *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999), that the relator must have sufficient knowledge of the fraudulent acts *alleged in the complaint*. *See also Mistick*, 186 F.3d at 388-89 (discussing relator's insufficient knowledge of the allegedly fraudulent statements set forth in the complaint). While the court of appeals below looked to the relator's complaint, it applied the wrong standard in assessing the relator's degree of knowledge as to the allegations in the complaint.

lines, reliance upon Rule 9(b) to measure the nature and quantum of the relator's knowledge would prohibit the relator from doing what Rule 9(b) also precludes a complainant from doing—using the discovery rules to make out a case that complies with Rule 9(b).

### A. Rule 9(b) Requires Relators To Plead The Details Of The Alleged False Claim

*Amici* urge the Court to hold that the sufficiency of the relator's information for purposes of qualifying as an "original source" must be assessed by utilizing the "particularity" standard of Rule 9(b), under which all fraud pleadings are measured. It is well established that because the FCA is an anti-fraud statute, all *qui tam* complaints must comply with Rule 9(b). *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-28 (1st Cir. 2004) (citing decisions of eight other circuit courts); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005), *cert. denied*, 75 U.S.L.W. 3163 (U.S. Oct. 2, 2006) (No. 05-1288). Thus, Rule 9(b) requires that a *qui tam* complaint set forth "such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3169 (U.S. Oct. 2, 2006) (No. 06-12); *see also United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (summarizing the pleading requirements as the "who, what, when, where, and how of the alleged fraud").

While not purporting to state a checklist of required details, the First Circuit's decision in *Karvelas* provides a good overview of the kinds of details required in a *qui tam* complaint alleging fraudulent Medicare charges.

> In a case such as this, details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the government, the particular goods or services for which the government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices are the types of information that may help a relator to state his or her claims with particularity.

*Karvelas*, 360 F.3d at 233. Karvelas' 93-page complaint attempted to describe over a dozen fraudulent Medicare reimbursement "schemes," but was dismissed because it "failed to 'provide reference to actual documentation' of the false claims that allegedly had been filed with the government." *Id.* at 232. *Qui tam* complaints which fail to pass muster under Rule 9(b) are dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 564-65 (6th Cir. 2003) (allegation that manufacturer engaged in improper testing procedures was dismissed for failure to identify false acts, statements made, persons involved, specific contracts or invoices); *United States ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 602 (7th Cir. 2005) (allegations that federal grantee performing medical research submitted false certifications of compliance with "Good Clinical Practices" failed to identify false statements on the submitted forms or how the forms related to or caused the Government to pay money which was not owed); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (relator's "broad allegations [which] included no particularized supporting detail" were insufficient to state a claim).

Courts have further clarified that relators cannot file a complaint and then rely upon the civil discovery process to supply the required particularity. *See, e.g., United States ex*

*rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002) (permitting relator "to learn the complaint's bare essentials through discovery . . . may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements"); *see also Karvelas,* 360 F.3d at 231 (relator may not present general allegations in lieu of details of actual false claims in hope that such details will emerge through subsequent discovery). Thus, the sufficiency of the relator's claim must be measured at the outset of the case based upon the information contained in the complaint. That same information set forth in the complaint also should be the basis for measuring the relator's qualifications as an original source.[5]

### B. Rule 9(b) And The Original Source Requirement Share The Same Goals

The Ninth Circuit has drawn an appropriate connection between Rule 9(b)'s particularity requirement and the purpose of the False Claims Act's original source provision:

> "[Q]ui tam suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime." . . . Because "insiders" . . . should have adequate knowledge of the wrongdoing at issue, such insiders should be able to comply with Rule 9(b).

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[5] If a relator seeks to add new allegations, either by formally amending the complaint or simply by raising different allegations at trial, those new allegations also are subject to the original source jurisdictional requirement. *See United States ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (determination of jurisdiction is made on a claim-by-claim basis). As discussed in point II.C. below, a relator who has been qualified as an original source with regard to his initial allegations, but subsequently presents new allegations derived from the Government's disclosure of its investigation of those initial allegations, would not qualify as an original source of those new allegations.

*Bly-Magee v. California,* 236 F.3d at 1019. The converse proposition also follows logically: Because the relator is required to file a complaint that complies with the particularity requirements of Rule 9(b), if the original source provision is triggered, fairness, consistency and sound policy considerations justify a rule requiring the relator to prove that his direct and independent knowledge extends to the details of what must be pleaded to satisfy Rule 9(b).[6]

This Rule 9(b) requirement for qualification as an original source was precisely the holding in *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1021 (E.D. Va. 1995), which explained its rationale as follows:

> [W]here a putative relator files a *qui tam* action without reliance on any public disclosure, Rules 9 and 11[7] supply the standards by which to assess the viability of the fraud allegations. No reason in logic or principle suggests that different standards should come into play in the event a prior disclosure triggers the operation of the jurisdictional "original source" provisions of § 3730(e)(4). . . .
>
> [A] person seeking relator status [must] have a core of knowledge about the fraud, which core the statute implicitly requires but does not explicitly define.

*Id.* at 1018-19, 1020. The court further explained that its holding was consistent with Congress' dual goals of encouraging *qui tam* prosecution while precluding parasitic suits. *See id.* at 1021. Applying the standard from Rule 9(b), the court found that the relator did not qualify as an original

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[6] Indeed, the Ninth Circuit, without expressly relying upon the Rule 9(b) standard, held that a relator's allegations which were "pure speculation" did not qualify the relator as an original source. *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 526 (9th Cir. 1999).

[7] Federal Rule of Civil Procedure 11 requires that a civil complaint be based upon allegations and other factual contentions which have evidentiary support. *Amici* believe that in this context Rule 11 is subsumed within the requirements of Rule 9(b).

source because his knowledge amounted to nothing "beyond a suspicion or hunch that [defendants] were engaging in fraud. . . ." *Id.* at 1022. The record in the instant case reflects the same inadequate basis underlying the relator's allegation.

In *Kinney v. Stoltz*, 327 F.3d at 675, the Eighth Circuit applied this same standard in measuring the sufficiency of the relator's knowledge under the original source exception. The relator, a paramedic, had brought suit against the hospital for which he worked, alleging that it had falsely certified ambulance services as medically necessary. Before his initial complaint was dismissed on summary judgment, he deposed four hospital employees and learned for the first time during those depositions that they had authorized the subject certifications. *Id.* at 672. After the dismissal of his initial complaint, he filed a second action against those employees. The court affirmed the dismissal of the second suit on the grounds that the information about the four employees' alleged wrongdoing had been publicly disclosed during the deposition in the first suit. *Id.* at 673. It measured the relator's knowledge under the Rule 9(b) standard and concluded that while the relator may well have had direct knowledge of the fact that some patients were not eligible for transport under Medicare, he had no direct knowledge of the four employees' alleged wrongdoings. *Ibid.*

Requiring a relator to have direct and independent knowledge of *all* of the particular allegations underlying his or her fraud claim is not an unduly restrictive approach.[8] For the most part, courts have shown appropriate flexibility in

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[8] Some courts have held that a relator can be an original source simply by having personal knowledge of *any* essential element of the underlying fraud transaction. *See, e.g., Nurse Anesthetists*, 276 F.3d at 1050; *Springfield Terminal Ry.*, 14 F.3d at 656-57. The inquiry into the relator's knowledge of *all* of the essential elements required to be set forth in the complaint is a more stringent requirement, but one with which a true whistleblower should have little difficulty complying.

assessing relators' compliance with Rule 9(b). *See, e.g., Karvelas*, 360 F.3d at 233 (noting that where the allegations concern the defendant's long-term practices, the complaint need not identify every single false claim that was submitted); *Corsello*, 428 F.3d at 1013 (allegations must contain "some indicia of reliability," including some first-hand accounts of wrongful practices leading directly to the submission of fraudulent claims). Under the case law, a relator need not include in his complaint every piece of evidence on which he intends to rely. It follows, therefore, that the relator need not have direct and independent knowledge of every piece of evidence that he will rely upon during the course of the litigation. *See Detrick*, 909 F. Supp at 1021. The core details of the fraud, however, along with at least some examples of the claims and statements submitted to the Government which are at issue in the case, must be identified in the complaint, and the relator must have direct and independent knowledge of those details in order to qualify as an original source. *See Mistick*, 186 F.3d at 388 (relator must know of the actual misrepresentation itself in order to qualify as an original source). Given Congress' intent to reward true whistle-blowers, it is reasonable to require a whistleblower to have direct and independent know-ledge of the information that he is required to plead in the complaint.

### C. A Relator Cannot Escape The Original Source Requirement By Amending The Complaint

Relators occasionally resort to filing amended complaints in an effort either to demonstrate direct and independent knowledge of additional facts or to add entirely new allegations based upon information learned from the Government's investigation or from their own civil discovery. This tactic, employed here by Respondent Stone, is a flagrant abuse of

the *qui tam* provisions.[9] The Court's decision in this case should put an end to the use of amended complaints as a means of circumventing the original source requirement.

In *Kinney*, *supra*, the relator argued that he was an original source of the allegations about the wrongdoing committed by the four employees, allegations which he included in his second lawsuit. He gained the requisite knowledge about the four employees during depositions relating to his initial complaint against the hospital. The Eighth Circuit looked to the *initial* complaint and held that if the relator had possessed knowledge of the fraud by the four employees, "he was obligated to identify them in his initial complaint." 327 F.3d at 675. The court in *United States ex rel. Ackley v. International Business Machines Corp.*, 76 F.Supp.2d 654, 659 (D. Md. 1999), reached the same conclusion, holding that the relator's two amended complaints "may well contain information obtained by way of [civil] discovery that skews the picture of what information [the relator] actually derived from public disclosures and what he may be the original source of."

Assessing the relator's knowledge as to the allegations contained in his initial complaint is a simple and straightforward way of ensuring that the relator does not rely upon subsequent publicly disclosed information, such as information obtained by the Government in its investigation and then

---

[9] According to the certiorari petition, Stone and the Government together filed an amended complaint which, for the first time, identified the alleged false claims stemming from the pondcrete allegations. But the amended complaint set forth an entirely different theory than the one in Stone's original complaint as to the cause of the pondcrete defects. At trial, none of the information of which Stone had direct and independent knowledge was presented to the jury. Pet. at 7-8. The tortuous history of Stone's "bait and switch" maneuvers in this action, which commenced following a newspaper report, reflects the classic parasitic *qui tam* case.

revealed to the relator by the Government.[10] Two Ninth Circuit cases illustrate the problem of relators amending their complaints to add entirely new allegations derived from the Government's investigation of the initial allegations. In *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), the relator's initial *qui tam* complaint alleged falsification of test results on flight data transmitters. The Government investigation of the transmitters uncovered an additional allegation that defendant had used inadequate damping fluid in the transmitters. When the Government subsequently dropped the damping fluid allegations, the relator amended his complaint to add that allegation. *Id.* at 409. As to whether the relator qualified as an original source with respect to the damping fluid allegations, the court of appeals dispensed entirely with any analysis of the relator's knowledge. Instead, the court asked only whether the relator's initial complaint "triggered" the Government's investigation that led to the disclosure of the new allegations. *Id.* at 411. While the court may have been inclined to permit the relator to be rewarded for triggering the investigation, original source status must be determined by the statutory language requiring direct and independent knowledge of the information underlying the allegations.

Similarly in *Seal 1*, 255 F.3d 1154, the relator filed a *qui tam* action against his former employer, Packard-Bell, alleging it had sold the Government used instead of new computers. As part of its investigation of the relator's

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[10] Several courts have correctly held that any disclosure of a government investigation, even to one person outside the Government, is a "public disclosure" under § 3730(e)(4)(A). *See, e.g., Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001) (Government's disclosure of its investigation to the relator is a public disclosure); *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (Government's disclosure of the scope of its investigation of defendant to innocent employees of defendant is a public disclosure).

allegations, the Government also investigated the computer sales practices of Zenith, one of Packard-Bell's competitors. In the course of its investigation, the Government disclosed to the relator evidence that Zenith had committed a similar fraud. Before the Government took any action against Zenith, the relator filed a *qui tam* action against Zenith on the sole basis of the information provided by the Government. *Id.* at 1156-58.

In *Seal 1*, the Ninth Circuit acknowledged that the relator had no knowledge of the allegations against Zenith before the Government discovered them. *Id.* at 1162. The court applied and slightly refined the "triggering" test from *Barajas*. The court inquired as to:

> (1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations.

*Id.* at 1163. Although the court found that the relator did not qualify as an original source because he did not provide sufficient assistance to the government in its investigation, *ibid.*, the standard applied by the court represents a significant departure from the statutory language and an open invitation for relators to capitalize on the fruits of the Government's investigation.

There is no better example of a parasitic *qui tam* suit than one that is derived solely from the disclosure of a Government investigation. Regardless of how this Court construes the phrase "direct and independent knowledge of the information on which the allegations are based," *amici* urge the Court to articulate a standard, consistent with Rule 9(b), which requires inquiry into the quantum and nature of the relator's knowledge. Such a standard should expressly reject

the notion that a relator can be an original source of allegations derived solely from a Government investigation, even if the investigation was triggered by the relator's initial complaint.

## III. AN "ORIGINAL SOURCE" MUST HAVE BEEN THE SOURCE OF THE PUBLIC DISCLOSURE AND MUST HAVE PROMPTLY NOTIFIED THE GOVERNMENT BEFORE FILING SUIT

Following a limited remand, the Tenth Circuit held that Respondent Stone satisfied the "jurisdictional disclosure requirement" of the original source definition, 31 U.S.C. § 3730(e)(4)(B). Pet. App. 53a. Because the lower courts differ as to the disclosure requirements of the original source exception, however, this Court should resolve those differences. Most courts have held that there are two parts to the disclosure requirement. The first part examines the connection between the public disclosure and the relator's disclosure. The second part involves the timeliness of the relator's voluntary disclosure directly to the Government.

In *Wang v. FMC Corp.*, 975 F.2d at 1418, the Ninth Circuit held that to be an original source, the relator must have been an *actual source* to whoever made the public disclosure. The court of appeals agreed that the relator, an engineer employed by defendant, had direct and independent knowledge of the alleged engineering deficiencies in the defendant's development of the Bradley Fighting Vehicle, but he waited until one year after his employment was terminated before notifying the Government. *Id.* at 1416-17. In the meantime, someone else publicly disclosed the alleged deficiencies to the news media. *Id.* at 1417. The court held:

> Anyone who helped to report the allegation to either the government or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed,

> he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence," and not their mimics.

*Id.* at 1419. Accordingly, the court held that "[t]o bring a *qui tam* suit, one must have had a hand in the public disclosure," or put another way, the relator "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *Id.* at 1418 (citing *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990)).

Although the requirement to "have a hand in the public disclosure" has been criticized by some circuits as lacking a textual basis, *see, e.g., Bank of Farmington*, 166 F.3d at 865, the Ninth Circuit found the statutory text to be ambiguous and relied upon the legislative history of the jurisdictional bar, which "make[s] clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based." *Wang*, 975 F.2d at 1418-19. *Amici* maintain that in view of imprecise use of language in the original source provision, as noted by Judge Alito in *Mistick*, 186 F.3d at 387, the bright-line rule articulated by the Ninth Circuit in *Wang* and Second Circuit in *Dick* achieves Congress' goal of ensuring that only a true whistleblower can bring a *qui tam* suit.

With regard to the relator's statutory obligation under § 3730(e)(4)(B) to "voluntarily provid[e] the information to the Government before filing an action," some relators have confused this disclosure requirement with a different statutory obligation, the requirement to serve the Government with a "written disclosure of substantially all material evidence and information the person possesses" at the same time the

complaint is filed. 31 U.S.C. § 3730(b)(2). Each of the circuit court decisions addressing these requirements has held that "compliance with the disclosure requirements of § 3730(b)(2) at the time of filing does not satisfy the pre-filing disclosure requirement of § 3730(e)(4)." *See e.g., United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001).

The key question arising in most cases is how soon before filing must the relator's disclosure to the Government occur. The Seventh Circuit, while not providing a bright-line test, correctly articulated Congress' purpose in enacting this requirement:

> Where the statute makes jurisdiction depend on events which occur at determinable times, such as a public disclosure of information or its voluntary provision to the government before filing a lawsuit, a plaintiff is encouraged not to dawdle. Just as one can lose a right to sue by the running of a statute of limitations, so a court can be denied jurisdiction by such an accident of timing. But the policy rationale is clear: The "intent of the Act . . . is to encourage private individuals who are aware of fraud against the government to bring such information forward at the *earliest possible time* and to discourage persons with relevant information from remaining silent." These goals are promoted by a jurisdictional rule requiring early divulgence of allegations of fraud.

*Farmington*, 166 F.3d at 866 (citations omitted) (emphasis in original).

How prompt must the relator's disclosure to the Government be? *Amici* contend that the disclosure must occur close to the time that the relator first observes the alleged wrongdoing. Where the relator is employed by the alleged wrongdoer, it would be reasonable for the court to permit enough time for the relator to attempt to correct the situation internally before informing the Government. A lower level employee may be given more time to effect such a change

than a manager who can exert more control within the company. But an employee who waits years after first learning of the wrongdoing and then notifies the Government only after he believes he has been a victim of some adverse employment action (which, unfortunately, is typical of many relators), would not satisfy the prompt disclosure requirement. Similarly, relators who, in the hope of enhancing their bounty, wait until the Government's damages have mounted would not qualify.

The D.C. and Sixth Circuits have imposed one clear limitation upon the timing of the relator's disclosure to the Government: It must occur before the public disclosure. *See Findley,* 105 F.3d at 690; *United States ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997). The D.C. Circuit appropriately focused on the practical fact that "[o]nce the information has been publicly disclosed . . . there is little need for the incentive provided by a *qui tam* action." *Findley* at 691. Similarly, the Sixth Circuit found it "difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." *McKenzie* at 942.

The lower courts have articulated different standards as to the timing of the relator's disclosure. *Findley* and *McKenzie* reject the Ninth Circuit's requirement in *Wang* that the relator be the source to the entity that made the public disclosure.[11] The requirement in *Findley* that the relator disclose the information to the Government before the public disclosure appears to represent a compromise between the Ninth Circuit's approach in *Wang* and the holding of the Fourth

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[11] The Ninth Circuit recently rejected the requirement in *Findley* and *McKenzie* that the relator notify *the Government* prior to the public disclosure, but reasserted its earlier holding in *Wang* that the relator be the source to whoever made the public disclosure. *See United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1014-16 (9th Cir. 2006).

Circuit in *Siller*, which does not obligate the relator to make any disclosure prior to someone else's public disclosure. *See Siller*, 21 F.3d at 1351-55.

*Amici* do not believe that the disclosure requirements articulated in *Wang* and *Findley* conflict. The requirement in *Wang* that the relator be the source of the public disclosure is consistent with Congress' goal of permitting suits only by true whistleblowers. And the requirement in *Findley* that the mandatory disclosure to the Government occur promptly after the relator learns of the wrongdoing and no later than the time of the public disclosure is a reasonable interpretation of that prong of the original source definition. A true whistleblower acting in the best interests of the Government can and should be required to comply with *both* of these disclosure obligations.

## CONCLUSION

After strictly construing the original source exception, the Court should reverse the Tenth Circuit's judgment and hold that the district court lacked jurisdiction over Respondent Stone's claims.

Respectfully submitted,

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October 2006

4670

No. 05-1272

Supreme Court, U.S.
FILED
OCT 26 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. and
BOEING NORTH AMERICAN, INC.,
*Petitioners*,

v.

UNITED STATES OF AMERICA AND
UNITED STATES OF AMERICA ex rel. JAMES S. STONE,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF COMSTOCK RESOURCES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| IDENTITY AND INTEREST OF *AMICUS CURIAE* | 1 |
| INTRODUCTION AND SUMMARY OF THE ARGUMENT | 3 |
| ARGUMENT | 4 |
| A. A Plain Reading of the FCA Requires a Relator to Possess Actual, First-Hand Knowledge of the Fraud to Qualify as an Original Source | 4 |
| 1. FCA Section 3730(b)(2) Requires a Relator to Possess and Disclose Evidence and Information to Support the Allegations of Fraud | 5 |
| 2. When the Public Disclosure Bar Is Triggered, the Relator Must Also Show That He Has "Direct and Independent Knowledge" of the Information on Which the Fraud Allegations Are Based | 7 |
| 3. The Tenth Circuit's Original Source Decisions in *Stone* and *Kennard* Conflict with the Plain Language and Structure of the FCA | 10 |
| B. The Tenth Circuit's Original Source Analysis From *Stone* and Its Progeny Leads to an Unworkable Standard for Jurisdiction | 12 |
| CONCLUSION | 17 |

# TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Dolan v. United States Postal Service*, 126 S. Ct. 1252 (2006) | 4 |
| *In re Natural Gas Royalties Qui Tam Litigation*, MDL-1293 (D. Wyo.) | 2, 15 |
| *Kennard v. Comstock Resources, Inc.*, 2002 WL. 32714554 (D. Wyo. Nov. 6, 2002) | 2, 14 |
| *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004) | *passim* |
| *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002) | 9 |
| *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000) | 13 |
| *United States ex rel. Alfatooni v. Kitsap Physician Services*, 163 F.3d 516 (9th Cir. 1998) | 8, 11-12, 16 |
| *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993) | 9 |
| *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995) | 8 |
| *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284 (4th Cir. 2002) | 13 |
| *United States ex rel. Campbell v. Redding Medical Center*, 421 F.2d 817 (9th Cir. 2005) | 7 |
| *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996) | 16 |
| *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d. Cir. 1997) | 9 |
| *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542 (7th Cir. 1999) | 13 |
| *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997) | 8, 9 |

TABLE OF AUTHORITIES—Continued

Page

*United States ex rel. Grayson v. Advanced Management Tech., Inc.*, 221 F.3d 580 (4th Cir. 2000) ..... 9

*United States ex rel. Grynberg v. Praxair*, 389 F.3d 1038 (10th Cir. 2004) ..... 12, 15-16

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) ..... 8, 9, 15

*United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) ... 13

*United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271 (10th Cir. 2001) .... 10

*United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993) ..... 13

*United States ex rel. Laird v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) ..... 8, 9

*United States ex rel. Mistick v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) ..... 9

*United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304 (5th Cir. 1999) ..... 5

*United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 8, 11

*United States ex rel. Stone v. Rockwell International*, 282 F.3d 787 (10th Cir. 2002) ..... *passim*

*United States ex rel. Thompson v. Columbia HCA Healthcare Co.*, 125 F.3d 899 (5th Cir. 1997) ..... 5

*United States ex rel. Woodard v. Country View Care Center*, 797 F.2d 888 (10th Cir. 1986) ..... 6

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States ex rel. Wright v. Chevron USA, Inc.*, Case No. 5:03-cv-264 (E.D. Tex.) | 13 |
| *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) | 10 |
| *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) | 5 |
| *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) | 11 |
| **STATUTES AND RULES** | |
| 31 U.S.C. §3729(a) | 2, 3 |
| 31 U.S.C. §3730 | 3 |
| 31 U.S.C. §3730(a) | 6 |
| 31 U.S.C. §3730(b)(2) | *passim* |
| 31 U.S.C. §3730(b)(5) | 7 |
| 31 U.S.C. §3730(d)(4) | 6 |
| 31 U.S.C. §3730(e)(4) | *passim* |
| Pub. L. 78-213, 57 Stat. 608 (Dec. 23, 1943) | 6 |
| Pub. L. 99-562, 100 Stat. 3153 (Oct. 27, 1986) | 6 |
| Pub. L. 100-700, 102 Stat. 4631 (Nov. 19, 1988) | 6 |
| S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 | 3, 11 |
| Fed. R. Civ. P. 9(b) | 5 |
| Fed. R. Civ. P. 11 | 5 |
| **OTHER** | |
| BLACK'S LAW DICTIONARY 460 (6th ed. 1990) | 8 |
| CHARLES ALAN WRIGHT & ARTHUR B. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1331 (2004) | 6 |
| JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §4.04[a] (3d ed. 2006) | 6 |

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**On Writ of Certiorari to the
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for the Tenth Circuit**

## BRIEF OF COMSTOCK RESOURCES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Comstock Resources, Inc. is a Texas based oil and gas company that owns substantial mineral interests on the Indian Reservation of the Alabama and Coushatta Indian Tribes of Texas (the "Tribe"), and on federal leases in the Gulf of Mexico. Each month, Comstock reports and pays royalties

[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other that *amicus curiae* and its counsel, monetarily contributed to the preparation or submission of this brief.

on mineral production from its Indian and federal leases to the United States Minerals Managements Service ("MMS").

Since 1998, Comstock has been defending a *qui tam* lawsuit filed by Relators Don Kennard and Harrold E. ("Gene") Wright under the reverse false claims provision of the False Claims Act ("FCA"), 31 U.S.C. §3729(a)(7). Relators allege that Comstock falsely reported and paid royalties owed to the Tribe and the United States. Comstock denies those allegations. Moreover, Comstock contends that Relators' claims are jurisdictionally barred because Relators cannot qualify as the "original source" of the allegations against Comstock under the plain language of the statute. *See* 31 U.S.C. §3730(e)(4)(B).

Relators' claims against Comstock are currently pending as a part of MDL-1293, *In re Natural Gas Royalties Qui Tam Litigation*, in the United States District Court for the District of Wyoming. The district court previously dismissed Relators' claim against Comstock for lack of subject matter jurisdiction under 31 U.S.C. §3730(e)(4). *See* 2002 WL 32714554 (D. Wyo. Nov. 6, 2002). But, the Tenth Circuit reversed that decision. *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1044-48 (10th Cir. 2004) ("*Kennard*"). In so doing, the Tenth Circuit employed an overly expansive reading of its prior decision in *United States ex rel. Stone v. Rockwell International*, 282 F.3d 787 (10th Cir. 2002) ("*Stone*"), to find that Relators satisfied the FCA's original source requirement for their claims against Comstock. *Kennard*, 363 F.3d at 1044.

Two terms ago, Comstock asked this Court to grant certiorari review of the Tenth Circuit's overly inclusive definition of what is required to be an original source under 31 U.S.C. §3730(e)(4)(B). *See* Case No. 04-165, *Comstock Resources, Inc. et al v. Don C. Kennard and Harrold E. Wright.* Now, in this amicus brief, Comstock supports an interpretation of the FCA's original source requirement that would require a

relator to possess actual, first-hand knowledge of the alleged fraud in order to qualify under the original source test's "direct and independent knowledge" standard. Comstock supports the interests of the Petitioners in this case.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The False Claims Act is a fraud statute. *See* 31 U.S.C. §3729(a). Congress drafted the FCA's *qui tam* provisions to allow relators to file suit on behalf of the United States to disclose and prosecute frauds against the Government. 31 U.S.C. §3730. Congress wanted to encourage "individuals who are close observers or otherwise involved in fraudulent activity" to break the "conspiracy of silence" surrounding the fraud. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. At the same time, Congress also wanted to avoid parasitic lawsuits by individuals seeking to profit from information that had already been publicly disclosed. 31 U.S.C. §3730(e)(4). Congress achieved its goals through several provisions in the FCA, including the disclosure requirement of 31 U.S.C. §3730(b)(2), and the jurisdictional bar against suits based upon public disclosure except for those brought by an original source, 31 U.S.C. §3730(e)(4).

This Court should reject the Tenth Circuit's original source test stated in *Stone* and *Kennard* because it erroneously allows a relator to qualify as an original source without any actual knowledge of the alleged fraud. Under the FCA's general disclosure provision that applies even in the absence of a public disclosure, a relator who possesses no evidence or information regarding an alleged fraud cannot satisfy the prerequisites to filing suit on behalf of the United States. *See* 31 U.S.C. §3730(b)(2). Moreover, a relator who lacks actual, first-hand knowledge of a fraud does not have "direct and independent knowledge" of the fraud sufficient to qualify as an original source able to file suit after the allegations have

been publicly disclosed. *See* 31 U.S.C. §3730(e)(4). In contrast to the clear knowledge requirement that Congress intended, the Tenth Circuit in *Stone* and *Kennard* has adopted an approach that leads to an ad hoc determination of how much speculation, deduction, and conclusion may substitute for the "knowledge" required by the statute.

This Court should adopt an original source standard that is consistent with the FCA's text, one that requires a relator to possess actual, first-hand knowledge of the fraudulent conduct or transaction that forms the basis of the relator's allegations. When crafting that standard, this Court should expressly disapprove of the Tenth Circuit's reasoning in *Stone* and *Kennard*.

## ARGUMENT

### A. A Plain Reading of the FCA Requires a Relator to Possess Actual, First-Hand Knowledge of the Fraud to Qualify as an Original Source.

When interpreting the meaning of Section 3730(e)(4), the Court should consider that provision in the context of the statute as a whole. *See Dolan v. United States Postal Service*, 126 S.Ct. 1252, 1257 (2006). The starting point to analyze whether a relator is qualified to pursue a *qui tam* action must begin with Section 3730(b)(2), which establishes the base requirements for a relator to be able to sue on behalf of the United States. The Tenth Circuit's reasoning in *Stone* and *Kennard* fails to recognize the impact of Sections 3730(b)(2). A party who has no knowledge of a fraud cannot file suit as a relator under Section 3730(b)(2), much less qualify as an original source under Section 3730(e)(4)(B).

### 1. *FCA Section 3730(b)(2) Requires a Relator to Possess and Disclose Evidence and Information to Support the Allegations of Fraud.*

FCA §3730(b) grants standing to qualified private individuals to file suit as *qui tam* relators on behalf of the United States. 31 U.S.C. §3730(b); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). In return for this authority to sue, a putative relator must serve the United States with "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. §3730(b)(2). Under the plain language of the FCA, then, the relator's disclosure of material evidence and information in his possession showing a fraud is a *quid pro quo* for receiving standing to sue on behalf of the United States. *See United States ex rel. Russell v. Epic Healthcare Mgmt Group*, 193 F.3d 304, 309 (5th Cir. 1999) (under the FCA "the government seeks to purchase information it might not otherwise acquire.").

Because Section 3730(b)(2) requires service of a "copy of the complaint" that will be filed with a federal court, Section 3730(b)(2)'s disclosure requirement must be read in the context of Fed. R. Civ. P. 11(b)(2). That rule requires a plaintiff to certify that "the allegations and other factual contentions [in a complaint] have evidentiary support."[2] If a putative relator possesses no evidence or information to support the fraud allegations in his or her FCA complaint, the relator's ability to file suit is constrained by Fed. R. Civ. P. 11. Nothing in Section 3730(b)(2) reflects any intent by Congress to allow a Relator to obtain standing to sue on behalf of the

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[2] Because the FCA is a fraud statute, the heightened pleading requirements of Fed. R. Civ. P. 9(b) apply to a relator's allegations. *See United States ex rel. Thompson v. Columbia HCA Healthcare Co.*, 125 F.3d 899, 903 (5th Cir. 1997).

United States to pursue a lawsuit that is lacking the evidentiary support required by Rule 11.[3] Of course, if a relator possesses evidence or information to support an FCA claim, the relator must disclose that evidence and information to the United States at or before the time of filing suit. 31 U.S.C. §3730(b)(2).

Several negative consequences occur when a relator files a *qui tam* lawsuit under the FCA without first showing the United States that he possesses evidence and information to support the claim. Because the United States has a duty to investigate the relator's allegations, *see* 31 U.S.C. §3730(a), the United States is forced to waste its limited resources chasing down unsubstantiated accusations with little evidence to guide the United States. This undermines a fundamental purpose of Section 3730(b)(2), which is to give the United States a full and fair opportunity to investigate allegations to determine whether to intervene. *See United States ex rel. Woodard v. Country View Care Center*, 797 F.2d 888, 892 (10th Cir. 1986); JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §4.04[a] (3d ed. 2006). Even worse, such a *qui tam* complaint filed without evidentiary support might

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[3] Rule 11 was adopted years before Section 3730(b)(2) was added to the FCA. Rule 11 was first adopted in 1938, and required "good grounds" to support the allegations in the complaint. *See* 5A CHARLES ALAN WRIGHT & ARTHUR B. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1331 at 459 (2004). The predecessor to Section 3730(b)(2) was adopted in 1943. *See* Pub. L. 78-213, 57 Stat. 608 (Dec. 23, 1943). Congress amended the FCA to include the current version of Section 3730(b)(2) in 1986, as part of the same amendments that added Section 3730(e)(4). *See* Pub. L. 99-562, 100 Stat. 3153 at 3154-55, 3157 (Oct. 27, 1986). In 1986, Congress also expressed its clear intent to prohibit frivolous *qui tam* lawsuits. *See* 31 U.S.C. §3730(d)(4) (allowing prevailing defendants to recover attorneys' fees and costs arising out of frivolous or vexatious lawsuits); Pub. L. 99-562, 100 Stat. 3153 at 3153157 (Oct. 27, 1986) (adopting §3730(d)(3)); Pub. L. 100-700, 102 Stat. 4631 at 4638 (Nov. 19, 1988) (moving §3730(d)(3) to §3730(d)(4)).

bar future relators who may actually possess information regarding fraud that would be useful to the United States. *See* 31 U.S.C. §3730(b)(5). *But cf. United States ex rel. Campbell v. Reading Medical Center*, 421 F.3d 817, 821-25 (9th Cir. 2005) (refusing to apply first-to-file bar when original lawsuit was dismissed for lack of jurisdiction).

Section 3730(b)(2) imposes no express limitation on the sources of evidence and information that a relator may rely upon to craft his FCA claim so long as that evidence and information is "material." 31 U.S.C. §3730(b)(2). Section 3730(b)(2) encourages the disclosure of fraud allegations, regardless of the source of the evidence and information to support those allegations.

### 2. *When the Public Disclosure Bar Is Triggered, the Relator Must Also Show That He Has "Direct and Independent Knowledge" of the Information on Which the Fraud Allegations Are Based.*

In instances when the fraud allegations have been publicly disclosed prior to the filing of the lawsuit, Congress imposed a different set of requirements that a relator must satisfy in order to be able to sue. The relator must qualify as an "original source." Congress defined "original source" to mean "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. §3730(e)(4)(B). In contrast to the general standard that applies to all relators under Section 3730(b)(2), Section 3730(e)(4) expressly addresses the source of the information that a relator must possess to meet the original source test—a relator must have and rely upon information that is within his "direct and independent knowledge." 31 U.S.C. §3730(e)(4)(B).

Congress' decision to impose a "direct and independent knowledge" requirement on top of the general disclosure requirements of Section 3730(b)(2) shows a clear intent to adopt a heightened standard for the type of "information" that a relator must possess to qualify as an original source. Not just any information will do. Many courts have interpreted this statutory language to require a relator to possess "first-hand knowledge" of the information. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information must be first-hand knowledge."); *United States ex rel. Alfatooni v. Kitsap Physician Services*, 163 F.3d 516, 525 (9th Cir. 1998) (relator "must show that he had firsthand knowledge of the alleged fraud . . ."); *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he saw [it] with his own eyes."); *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 160 (3d Cir. 1991) ("the relator must possess substantive information about the particular fraud"). After all, "direct knowledge" is knowledge that is gained from actually seeing the events in question. *See* BLACK'S LAW DICTIONARY 460 (6th ed. 1990) (defining "direct evidence").

Although the federal circuit courts (except the Tenth Circuit in *Stone* and *Kennard*)[4] appear to agree that a relator must possess first-hand knowledge to be an original source, the courts are divided on what "knowledge" is required. *See United States ex rel. Laird v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003). Some courts require the relator to possess knowledge

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[4] Prior to *Stone*, the Tenth Circuit also recognized that an original source must possess first-hand knowledge to satisfy the requirements of Section 3730(e)(4)(B). *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999).

of the allegations of fraud in the *qui tam* complaint. *See, e.g., United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999); *United States ex rel. Mistick v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 410-11 (9th Cir. 1993). Other courts require the relator to have knowledge of the publicly disclosed allegations. *See Laird*, 336 F.3d at 355; *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1047 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *Findley*, 105 F.3d at 690. In many cases, though, this should be a distinction without a difference.

Regardless of the standard used, the disclosure must identify "allegations or transactions" in order to qualify as a public disclosure. 31 U.S.C. §3730(e)(4)(A). Given that the FCA is a statute aimed at fraud against the Government, the "allegations or transactions" that trigger the public disclosure bar are allegations of fraud or wrongdoing, or the elements of the underlying fraudulent transaction. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d. Cir. 1997). Accordingly, to be an original source, a relator must possess first-hand knowledge of the facts underlying and supporting the allegations of fraud, wrongdoing, or the underlying fraudulent transaction. This interpretation of the original source requirement preserves the distinction drawn by Congress regarding the types of information that may be used to satisfy the differing requirements of Sections 3730(b)(2) and 3730(e)(4).[5]

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[5] To be an original source under 31 U.S.C. §3730(e)(4), a relator must also have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." This disclosure is different than that required by Section 3730(b)(2) because, *inter alia*, it requires a disclosure to the Government "before"

### 3. *The Tenth Circuit's Original Source Decisions in Stone and Kennard Conflict with the Plain Language and Structure of the FCA.*

The original source test articulated by the Tenth Circuit in *Stone* and extended in *Kennard* should be rejected because it states that a relator can qualify as an original source without any knowledge of the actual fraud. In *Stone*, the court allowed the relator to qualify as an original source of a claim alleging false statements made by Rockwell International *after* the relator ceased to work for the company. 282 F.3d 802-03. The court found that Stone had sufficient background knowledge about Rockwell's business practices to allow him to speculate or deduce that Rockwell submitted false statements even after he left. *Id.* In *Kennard*, the Tenth Circuit summed up its prior decision in *Stone* by explaining:

> Comstock's first assertion, that Relators did not possess information about the particular fraud, has no basis in Tenth Circuit precedent. Knowledge of the actual fraudulent conduct is not necessary. *See Stone*, 282 F.3d at 803. A relator "need only possess 'direct and independent knowledge of the *information on which the allegations are based*'." *Id.* (quoting 31 U.S.C. §3730(e)(4)(B)) (emphasis in original). A "relator need not . . . have in his possession knowledge of the actual fraudulent conduct itself; knowledge 'underlying and supporting' the fraud allegations is sufficient." *Id.* (quoting *Hafter*, 190 F.3d at 1162). Thus, the fact that Relators did not have knowledge of the actual alleged fraudulent submissions to the Government cannot disqualify them as an original source.

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filing suit whereas Section 3730(b)(2) allows for disclosure at the time suit is filed. *Compare* 31 U.S.C. §3730(e)(4)(B) *with* 31 U.S.C. §3730(b)(2). Courts have recognized this distinction. *See United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999); *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280-81 (10th Cir. 2001).

*Kennard*, 363 F.3d at 1044. The Tenth Circuit's decisions in *Stone* and *Kennard* are nothing short of a license to base a claim of fraud upon speculation, conclusions, and deductions, regardless of whether the relator has any direct knowledge of any actual fraud. The Tenth Circuit's language cannot be squared with the plain language of the FCA, which requires a relator to possess first-hand knowledge of the fraud he alleges.

The Tenth Circuit's reasoning in *Stone* and *Kennard* cannot be squared with Congress' stated intent. Congress clearly intended the FCA to reward only those who were close observers or participants in a fraud who decided to break the conspiracy of silence. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. In other words, Congress' goal in adopting the FCA's *qui tam* provisions was to provide an incentive for whistle-blowing insiders to disclose fraud against the Government. *See Stinson*, 944 F.2d at 1161 ("The paradigmatic 'original source' is a whistleblowing insider."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm *qui tam* plaintiff is the 'whistleblowing insider.'"). Contrary to Congress's intent, in *Stone*, the Tenth Circuit allowed a relator to qualify as an original source even though he was no longer an insider with access to information regarding the defendant's actual practices. 282 F.3d at 802-03. In *Kennard*, the Tenth Circuit went further, explaining that the question of whether a relator was an insider who would have access to information regarding the actual practices of a defendant was "a concern we deem irrelevant to the current inquiry." 363 F.3d at 1047.

Although it may not be necessary to be classified as an "insider" to qualify as an original source, it is certainly not permissible to allow a party to be an original source based upon speculation, suspicions, or a mere belief that the defendant had an opportunity to commit a fraud. *See Alfatooni*,

163 F.3d at 526. An original source is someone who has actual, first-hand knowledge of wrongdoing.

### B. The Tenth Circuit's Original Source Analysis From *Stone* and Its Progeny Leads to an Unworkable Standard for Jurisdiction.

The Tenth Circuit's original source decisions in *Stone* and its progeny reflect a fact-based inquiry that allows some (but not all) relators to qualify as original sources without possessing any knowledge of the actual fraud. The problems with the *Stone* approach are best illustrated by comparing the Tenth Circuit's decisions in *Kennard v. Comstock*, *supra*, and *United States ex rel. Grynberg v. Praxair*, 389 F.3d 1038 (10th Cir. 2004).

In both *Kennard* and *Grynberg*, the Tenth Circuit explained that: "it is the character of the relator's discovery and investigations that controls [the original source] inquiry" when a relator is trying to use public records and other materials to substitute for the lack of actual knowledge of a fraud. *See Kennard*, 363 F.3d at 1044-45; *Grynberg*, 389 F.3d at 1053. To explain the results reached in those cases, however, the Tenth Circuit has crafted new legal standards that have no basis in the text of the FCA. Of course, the Tenth Circuit's point of departure from the text of the FCA is *Stone*.

a. In *Kennard*, the Tenth Circuit allowed two relators to qualify as original sources even though they possessed no inside knowledge of Comstock's operations, and no firsthand knowledge of fraud. The first relator, Relator Wright, claimed to own mineral interests in private East Texas oil and gas leases that were "near" to, but different from, the Indian leases at issue in the *Kennard* case. 363 F.3d at 1040. Relator Wright claimed that his royalty payments decreased when Comstock took over the operations on his property. *Id.* From this single alleged instance of underpayment on his

private leases, Relator Wright "speculated" that Comstock must be underpaying royalties owed to the Tribe from operations on wholly different leases in which Wright owns no interest.[6] *Id.* at 1040-41. Because the Tribe is under the federal trust supervision of the United States Secretary of the Interior, Comstock is required to report and pay the royalties it owes to the Tribe to the MMS. *Id.* at 1040. Accordingly, Relator Wright believed that the alleged underpayments to the Tribe were also the subject of false claims submitted to the United States. *Id.* at 1048. Relator Wright, of course, had no personal knowledge of what royalties were paid to the Tribe, or how those royalties were calculated. Moreover, Relator Wright had no knowledge of what discussions may have been held between Comstock, the Tribe, and the United States about how to report and pay royalties.[7] Nevertheless, the

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[6] Relator Wright has filed FCA claims against more than 40 other companies based upon similar speculative theories of wrongdoing. *See United States ex rel. Wright v. Chevron USA, Inc.*, Case No. 5:03-cv-264, in the United States District Court for the Eastern District of Texas. Employing reasoning similar to that used by the Tenth Circuit in *Stone* and *Kennard*, the district court in the *Wright* case found that Wright qualified as an original source based upon his background knowledge and speculation. The district court allowed Wright to qualify as an original source of claims against companies about whom Wright admitted under oath that he had no direct knowledge regarding their royalty reporting or payment practices.

[7] Knowledge of the contacts between a defendant and the United States is highly relevant to an FCA case. Many courts recognize that the Government's knowledge of particular conduct and its cooperation with a defendant may bar an FCA claim based upon that conduct. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000); *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999); *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Tenth Circuit found that Relator Wright had "direct and independent knowledge" of the fraud he alleged. *Id.* at 1046.

Relator Kennard's claim to original source status was equally suspect. According to the Tenth Circuit, Kennard conducted an investigation of public records to support his conclusions that Comstock underreported and underpaid royalties owed to the Tribe. *Id.* at 1046. Kennard claims to have seen a lease file marked "expired" in the Texas General Land Office, which lead him to conclude that Comstock's leases were invalid. *See* 2002 WL 32714554, *6. He also claims to have reviewed other public records that led him to believe that Comstock underpaid royalties to the Tribe. *Id.* Of course, like Wright, Relator Kennard had no personal knowledge of what royalties were paid to the Tribe, or how those royalties were calculated. Relator Kennard had no knowledge of what discussions may have been held between Comstock, the Tribe, and the United States about how to report and pay royalties. He did not even know the details surrounding the creation of the public records (*i.e.* hearsay) that he reviewed to support his theory. Nevertheless based on its reasoning in *Stone*, the Tenth Circuit found that Relator Kennard had "direct and independent knowledge" of the fraud he alleged. *Id.* at 1046.

When Comstock protested that Relators did not have any knowledge of whether a fraud had been committed, the Tenth Circuit explained: "[t]here must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim." *Id.* at 1046. Relators had no access to information regarding Comstock's actual practices with respect to its operations on the Tribe's Reservation because Relators were not insiders of either Comstock or the Tribe. In their roles as outsiders, Relators had no first-hand knowledge about any elements of an FCA claim. More specifically they had no direct knowledge of, and could only speculate wildly about: what statements were

or were not made to the Government, whether those statements were or were not true; and if untrue, whether those statements were made with the intent required by the statute. Relators do not qualify as original sources under the plain language of Section 3730(e)(4)(B). Nevertheless, the Tenth Circuit allowed Relators to qualify as original sources because:

> This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

*Id.*

With this decision, the Tenth Circuit expanded its prior decision in *Stone* to a new level, allowing claims based solely upon speculation and deduction. The Tenth Circuit explained that this new standard to qualify as an original source is an alternative to the first-hand knowledge requirement imposed by earlier Tenth Circuit decisions. *Id.* (distinguishing *Hafter*, 190 F.3d at 1162-63). There is no support for this alternative in the FCA's text.

b. Later, in *United States ex rel. Grynberg v. Praxair*, the Tenth Circuit reached a correct conclusion by finding that a relator with no first-hand knowledge of the fraud was not an original source.[8] According to the Tenth Circuit, Relator Grynberg could not qualify as an original source because his allegations of wrongdoing against Praxair were based on information he learned from another individual and on a government report that disclosed the allegedly fraudulent transaction that formed the basis of his lawsuit. 389 F.3d at

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[8] Relator Grynberg has filed in excess of 70 *qui tam* lawsuits under the FCA in which the original source test is at issue. Those lawsuits were consolidated for pretrial proceedings (along with the *Kennard* case) in MDL-1293, *In re Natural Gas Royalties Qui Tam Litigation*, in the United States District Court for the District of Wyoming.

1054. In the process of rendering that decision, though, the Tenth Circuit highlighted its erroneous legal standards from *Stone* and *Kennard*.

The Tenth Circuit began by explaining that the facts of *Kennard* and *Grynberg* were "somewhat similar." *Id.* at 1053. The court distinguished *Kennard*, however, by finding that "Grynberg was not the individual who 'ferreted out the fraud.'" *Id.* at 1054. The court also distinguished Grynberg from Relator Wright by finding that Wright was able to form "suspicions" of wrongdoing by reviewing his own private royalty statements, whereas Relator Grynberg had no private records of his own to review. *Id.* By discussing prior precedent based on "suspicions" and the results of "ferretting," the *Grynberg* decision highlights just how far the Tenth Circuit's decisions in *Stone* and its progeny have departed from the text of the FCA.

c. There is no basis in the text of the FCA for a "ferreting out the alleged fraud" or "sniffing it out" theory to qualify as an original source.[9] Moreover, the FCA flatly rejects original source status based on speculation and deductions. Under the FCA, a relator must have "knowledge" to be an original source. 31 U.S.C. §3730(e)(4)(B).

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[9] Although one purpose of the FCA's *qui tam* provisions is to "ferret" out fraud against the Government, Congress' goal was "to ferret 'out fraud by encouraging persons with *firsthand knowledge* of alleged wrongdoing to come forward.'" *Alfatooni*, 163 F.3d at 525 (quoting *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 360 (9th Cir. 1996)) (emphasis added). The Ninth Circuit discussed the FCA's purpose in the context of the original source test's first-hand knowledge requirement. The Tenth Circuit, however, used the FCA's goal of ferreting out an alleged fraud as a substitute for the FCA's knowledge requirements.

## CONCLUSION

Comstock Resources, Inc. respectfully requests that this Court enter a decision in this case that interprets the FCA's original source provision according to its plain language. In the process, the Court should expressly reject the Tenth Circuit's line of authority reflected in *Stone* and *Kennard* that states that a relator need not possess actual first-hand knowledge of an alleged fraud to be an original source. The Tenth Circuit's reasoning is contrary to the plain language of the statute.

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No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP.
AND BOEING NORTH AMERICAN, INC.,
*Petitioners,*

v.

UNITED STATES OF AMERICA

AND

UNITED STATES *EX REL.* JAMES S. STONE,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF OF SENATOR CHARLES E. GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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November 20, 2006

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

I. THE PARAMOUNT PURPOSE OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT IS TO ENLIST PRIVATE CITIZENS TO CONTRIBUTE THEIR INFORMATION AND RESOURCES TO ASSIST THE GOVERNMENT IN ITS ANTI-FRAUD LAW ENFORCEMENT EFFORTS ..... 4

A. As Originally Enacted in 1863, the False Claims Act Authorized Private Persons To Pursue Fraud Claims on Behalf of the Government Regardless of the Source of the Person's Knowledge ..... 5

B. Congress Amended the False Claims Act in 1943 To Address a Perceived Problem with Parasitic Suits by Prohibiting *Qui Tam* Actions When the Complaint Was Based Upon Information Already in the Government's Possession ..... 6

C. In 1986 Congress Sought To Correct the 1943 Version of the Law by Carefully Crafting a Limited Bar to Certain Parasitic Suits ..... 11

II. THE PUBLIC DISCLOSURE BAR PROVIDES A LIMITED FILTER TO PRECLUDE *QUI TAM* ACTIONS THAT ARE BASED UPON SPECIFIC FRAUD ALLEGATIONS ALREADY AVAILABLE TO THE GOVERNMENT IN ITS OWN PROCEEDINGS AND INVESTIGATIONS OR THROUGH THE NEWS MEDIA. ..... 16

A. The Public Disclosure Bar Has No Application When the Government Joins the Case ..... 16

B. The Public Disclosure Bar Precludes Only Parasitic Suits. ..... 17

C. The Original Source Exception Prevents the Public Disclosure Bar from Excluding Persons Who Brought to the Government Their Own Information That Was Independent of the Public Disclosure ..... 20

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Page**

**Cases**

*A-1 Ambulance Service, Inc. v. California*,
202 F.3d 1238 (9th Cir.), *cert. denied*,
529 U.S. 1099 (2000) ..... 18

*United States v. Aster*,
275 F.2d 281 (3d Cir.),
*cert. denied*, 364 U.S. 894 (1960) ..... 11

*United States v. Pittman*,
151 F.2d 851 (5th Cir. 1945),
*cert. denied*, 328 U.S. 843 (1946) ..... 17

*United States v. Rippetoe*,
178 F.2d 735 (4th Cir. 1949) ..... 11-12

*United States ex rel. Jones v. Horizon Healthcare Corp.*,
160 F.3d 326 (6th Cir. 1998) ..... 18

*United States ex rel. Lamers v. City of Green Bay*,
168 F.3d 1013 (7th Cir. 1999) ..... 20

*United States ex rel. Lapin v. Int'l Bus. Machines Corp.*,
490 F. Supp. 244 (D. Haw. 1980) ..... 11

*United States ex rel. Longstaffe v. Litton Industries, Inc.*,
296 F. Supp. 2d 1187 (C.D. Cal. 2003) ..... 21

*United States ex rel. Marcus v. Hess*,
127 F.2d 233 (3d Cir. 1942) ..... 6, 7

*United States ex rel. Marcus v. Hess*,
317 U.S. 537 (1943) ..... 7

*United States ex rel. Springfield Terminal Ry. Co. v. Quinn*,
14 F.3d 645 (D.C. Cir. 1994) ..... 20

*United States ex rel. Wisconsin v. Dean*,
729 F.2d 1100 (7th Cir. 1984) ..... 12, 20

**Statutes and Rules**

Act of December 23, 1943, ch. 377, 57 Stat. 608 ..... 11, 17

Act of March 2, 1863, ch. 67, 12 Stat. 696 ..... 6

False Claims Amendments Act of 1986,
Pub. L. No. 99-562, 100 Stat. 3153 (1986),
*codified at* 31 U.S.C. §§ 3729-3733 ..... 1, 15

31 U.S.C. § 3730(b)(4)(A) ..... 17

31 U.S.C. § 3730(c)(2)(A) ..... 17

31 U.S.C. § 3730(d) ..... 17, 21

31 U.S.C. § 3730(e)(4) ..... 17

31 U.S.C. § 3730(e)(4)(A) ..... 18

31 U.S.C. § 3730(e)(4)(B) ..... 21

Sup. Ct. Rule 37.6 ..... 1

**Congressional Materials**

Cong. Globe, 37th Cong., 3d Sess. 952 (1863) ..... 5

Cong. Globe, 37th Cong., 3d Sess. 955 (1863) ..... 5

88 Cong. Rec. 9138 (1942) ..... 7

89 Cong. Rec. 2801 (1943) ..... 7

89 Cong. Rec. 7438 (1943) ..... 9

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89 Cong. Rec. 7608 (1943) ..... 10

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89 Cong. Rec. 7806 (1943) ..... 10

89 Cong. Rec. 10844 (1943) ..... 11

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131 Cong. Rec. 22322 (1985) ..... 13

132 Cong. Rec. 20530-42 (1986) ..... 14

132 Cong. Rec. 20531 (1986) ..... 15

132 Cong. Rec. 20535 (1986) ..... 13, 23

132 Cong. Rec. 20536 (1986) ..... 14

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145 Cong. Rec. 16025, 16031 (1999) ..... 18, 21

False Claims Act Implementation: Hearing Bef. the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) ..... 19

False Claims Amendments Act of 1986,
S. Rep. No. 345, 99th Cong., 2d Sess.,
*reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 12, 13, 14

H.R. 1203, 78th Cong., 1st Sess. (1943) ..... 7

H.R. Rep. No. 263, 78th Cong., 1st Sess. (1943) ..... 7

H.R. Rep. No. 933, 78th Cong., 1st Sess. (1943) ..... 11

S. 1562, *reprinted in* False Claims Reform Act:
Hearing Bef. the Subcomm. on Admin. Prac.
and Proc. of the Sen. Comm. on the Judiciary,
99th Cong., 1st Sess. (Sept. 17, 1986) .... 13, 14, 15, 16

S. 2754, 77th Cong., 2d Sess. (1942) ..... 7

S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) ..... 6, 7

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How Extensive is it? How Can it be Controlled?
(1981) ..... 12-13

## INTEREST OF AMICUS CURIAE*

*Amicus Curiae* Senator Charles Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, *codified as amended* at 31 U.S.C. §§ 3729-3733. That Act substantially revised the original False Claims Act, which was first enacted in 1863 to draw on the information and resources of private citizens in combating fraud against the Government. Since the enactment of the 1986 amendments, *qui tam* relators have assisted in returning well over $15 billion to the United States Treasury.[1] As a principal sponsor of this important legislation, Senator Grassley has a strong interest in presenting his purpose in crafting the 1986 amendments to the Act generally and specifically the public disclosure bar and its original source exception at issue in this case.

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* In accordance with Rule 37.6, *amicus curiae* certifies that counsel for a party did not author this brief in whole or in part and that the only monetary payment for preparation or submission of this brief was by the law offices of John Clark for its printing. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief in support of either petitioners or respondents, and letters reflecting respondents' consent to the filing of this brief have been filed with the Clerk.

[1] *See* www.usdoj.gov/opa/pr/2005/November/05_civ_595.html (reporting recoveries though fiscal year 2005); http://www.taf.org/statistics.htm (reporting additional recoveries).

## SUMMARY OF ARGUMENT

The *qui tam* provisions of the False Claims Act have always had as their central purpose enlisting the information and resources of private citizens to assist the Government in its efforts to combat fraud. That purpose is as essential to the Government today to confront fraud in Government programs from reconstruction in Iraq to aid for victims of Hurricane Katrina, as it was when the Act was first adopted in 1863 to redress profiteering during the Civil War. As a result of the 1986 Amendments, the Government has recovered billions of dollars taken from it by fraud, which the Government might never have learned about or pursued without the assistance of private citizens.

As originally enacted, the False Claims Act authorized a private person, or *qui tam* relator, to pursue a fraud claim on behalf of the United States Government, without regard to the source of the person's information. The Act did not authorize the Government to intervene in the relator's case, and a successful relator was entitled to fifty percent of the total recovery.

In 1943, at the request of the Attorney General, Congress amended the *qui tam* provisions of the False Claims Act to bar *qui tam* suits that were based upon information about fraud already in the Government's possession. The Attorney General had expressed concern that relators were abusing the Act by copying criminal indictments and filing them as complaints to claim a reward, without contributing any information of their own. Although some members of Congress questioned the extent of the problem, Congress was persuaded to bar such parasitic suits. The 1943 amendment required a relator to provide all information in the relator's possession to the Government before filing suit and allowed a relator to pursue a case only if the Government elected not to do so. If the Government declined to pursue the case, the *qui tam* suit could not be pursued if the Government possessed information about the fraud at the time the case was filed.

Courts applied the literal language of the 1943 amendment to bar any *qui tam* suit where the Government was already aware of the fraud, even if the only source of the Government's knowledge was the information the relator provided before filing suit, as the law required. As a result, *qui tam* relators whose lawsuits were not in any sense parasitic were barred from pursuing a civil action on the Government's behalf, and the *qui tam* provisions of the statute largely fell into disuse.

In 1986, Congress sought to revitalize the False Claims Act and make it a more effective means of eombating fraud. The 1986 Congress agreed with the policy choice of the 1943 Congress that parasitic actions should be barred. To ensure that only parasitic suits were barred, however, Congress discarded the Government knowledge bar and replaced it with the public disclosure bar. The public disclosure bar was intended to exclude only suits actually based upon revelations about specific instances of fraud that were publicly disclosed in certain Government proceedings or the news media. In order to limit such exclusion only to truly parasitic *qui tam* actions, Congress added the "original source" exception to the bar. The exception allows a relator to proceed with a case based upon publicly disclosed allegations of fraud, if the relator brought his own information underlying his allegations, independent of the public disclosure, to the Government before filing his suit.

Courts have since interpreted the public disclosure bar and its original source exception to bar a wide range of suits that are not parasitic in any sense, in conflict with both the language of the law and congressional intent. In the process, courts have created an increasingly complex and burdensome set of requirements that unnecessarily deter private citizens from assisting the Government. Unless a suit is truly parasitic of disclosures made public in certain Government proceedings or the news media, the suit serves Congress's purposes in authorizing *qui tam* actions. The Act seeks to encourage persons with information about fraud to provide

that information to the Government and to bring their resources to bear on the problem. The Act provides other ways to address concerns about the level of the relator's contribution to the ultimate resolution of the case. The public disclosure bar and its original source exception were never intended to be used to deprive the Government of the assistance of relators whose actions are not parasitic.

## ARGUMENT

### I. THE PARAMOUNT PURPOSE OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT IS TO ENLIST PRIVATE CITIZENS TO CONTRIBUTE THEIR INFORMATION AND RESOURCES TO ASSIST THE GOVERNMENT IN ITS ANTI-FRAUD LAW ENFORCEMENT EFFORTS.

Since the inception of the False Claims Act, the central purpose of the *qui tam* provisions has been to enlist private citizens in combating fraud against the Government in several important ways. First, the provisions hold out the promise of a reward to the private citizens who file suits on the Government's behalf to encourage them to disclose their information about fraud to the Government, notwithstanding the considerable personal risks that can entail. Second, and equally important, by providing the relator an ongoing role in the case, the Act enhances the ability of the Government to pursue cases it might otherwise need to abandon for lack of resources. Finally, authorizing private citizens to pursue cases on the Government's behalf provides a measure of public oversight when the Government fails to act.

Within this framework, the public disclosure bar serves the limited purpose of preventing parasitic suits based on fraud that has already been publicly exposed in a manner that is likely to alert the Government to the misconduct alleged and to spur it to appropriate action. The sole purpose of the original source exception to the public disclosure bar is to

further limit the reach of the public disclosure bar. The exception preserves cases involving publicized fraud allegations that were brought by persons who gave their own information underlying their complaint's allegations to the Government before filing suit. As courts have noted, in enacting the 1986 Amendments to the False Claims Act, Congress sought to balance the Government's interests in enlisting the information and resources of private citizens with the need to discourage opportunistic suits by persons who did not contribute their own information. However, Congress did not afford those interests equal weight. The Act Congress adopted weighs heavily in favor of pursuing fraud against the Government, while providing narrow filters to exclude only truly parasitic actions.

### A. As Originally Enacted in 1863, the False Claims Act Authorized Private Persons To Pursue Fraud Claims on Behalf of the Government Regardless of the Source of the Person's Knowledge.

Congress first adopted the False Claims Act in 1863 during the Civil War.[2] The measure had been introduced in Congress at the "urgent solicitation of the officers who [were] connected with the administration of the War Department and Treasury Department" in response to complaints about "the frauds and corruptions practiced in obtaining pay from the Government during the [Civil] War."[3] Congress sought to enact "a more speedy and vigorous remedy" that would seek the assistance of private citizens in prosecuting fraud. As the sponsor explained, "The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class."[4]

The 1863 Act authorized private individuals, or "*qui tam* relators," to bring a suit on behalf of the United States to

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[2] Act of March 2, 1863, ch. 67, 12 Stat. 696.

[3] Cong. Globe, 37th Cong., 3d Sess. 952 (1863).

[4] Cong. Globe, 37th Cong., 3d Sess. 955 (1863).

redress fraud against the Government. The Act provided for double damages and a $2,000 civil penalty per false claim. A private individual who successfully pursued a claim was entitled to half of the Government's recovery. The Act did not authorize the Government to intervene in the private individual's case, nor did the Act preclude *qui tam* actions based upon the source of the relator's information.[5] The Government thus sought both to encourage private citizens to report their information about fraud and to use their own resources in pursuing claims on the Government's behalf.

### B. Congress Amended the False Claims Act in 1943 To Address a Perceived Problem with Parasitic Suits by Prohibiting *Qui Tam* Actions When the Complaint Was Based Upon Information Already in the Government's Possession.

Nearly 80 years later, in the midst of another war, Attorney General Francis Biddle wrote to Congress to seek a change to the False Claims Act based on his concern that lawyers were filing *qui tam* complaints that were copied straight from criminal indictments.[6] These types of suits, the Attorney General urged, did not serve the original purposes of the *qui tam* provisions. Relators who copied the Government's own work contributed little or no information to the Government and interfered with the Government's criminal cases.[7] The example the Department cited was a case from the Third Circuit, *United States ex rel. Marcus v. Hess*, 127 F.2d 233, where the appellate court had reversed a trial court award in favor of a relator.[8] The Attorney General pressed Congress to repeal the authorization for *qui tam* actions.

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[5] Act of March 2, 1863, 12 Stat. 696.

[6] S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) (reprinting letter).

[7] *Id.*

[8] *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 235 (3d Cir. 1942) (observing that because informer statutes have

Although the Senate quickly responded to the Attorney General's entreaty by adopting a measure to repeal the *qui tam* provisions in their entirety, the House did not act before the close of the 77th Congress.[9] At the commencement of the 78th Congress, the House took up H.R. No. 1203, which was identical to the earlier Senate bill proposing repeal of the *qui tam* provisions.[10] The House Committee on the Judiciary reported the measure without substantive amendment,[11] and the House passed H.R. 1203 on April 1, 1943.[12]

When the Senate took up the proposed repeal this time, acquiescence in the Attorney General's request was not immediately forthcoming. The Committee on the Judiciary did not recommend approval of the repeal, but instead reported the measure with amendments. The proposed amendments would have maintained the *qui tam* provisions, but would have provided a bar to parasitic suits. The proposed bar would have provided that no court "shall have power or jurisdiction" over a *qui tam* action unless:

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been regarded with disfavor, they must be construed with utmost strictness, and concluding that the relator had not established that a claim had been submitted to the United States).

[9] S. 2754, 77th Cong., 2d Sess. (1942), passed, Nov. 27, 1942, 88 Cong. Rec. 9138 (1942). The Senate Report recommending passage consisted solely of the Attorney General's letter. *See* S. Rep. No. 1708, *supra* note 6.

[10] H.R. 1203, 78th Cong., 1st Sess. (1943).

[11] H.R. Rep. No. 263, 78th Cong., 1st Sess. 2 (1943). Like the earlier Senate Report, the House Report consisted solely of a letter from the Attorney General requesting the repeal, this time citing the Supreme Court's then very recent decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which reversed the Third Circuit and allowed the relator to recover.

[12] 89 Cong. Rec. 2801 (1943).

- the case was "based upon information, evidence, and sources original with such person and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it;"
- prior to commencement of the action the person "made full disclosure in writing to the Attorney General of the grounds thereof, and has requested the Attorney General to cause such suit to be brought;" and
- the Attorney General has "declined in writing to comply with such request, or has allowed six months to elapse after receipt of such disclosure and request without causing a suit to be brought."[13]

The report explained that the Committee had amended the House proposal "to protect and compensate genuine informers who comply with the provisions respecting notice to the Attorney General."[14] At the same time, the proposal sought to address the concerns of the Department of Justice that:

> many persons who have filed suits and may file suits under this section, have no information or facts of their own, but prepare and file complaints which obviously are based on information and alleged facts obtained bodily from indictments returned in United States courts, from newspaper stories, and congressional investigations. In some of the cases filed the indictment was

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[13] S. Rep. No. 291, 78th Cong., 1st Sess. 1-2 (1943).

[14] *Id.* at 1.

> copied in the complaint filed, the only difference being the caption and the prayer of the complaint.[15]

The report included the minority views of Senator William Langer of North Dakota, who took issue with the Department of Justice's claim that there was a crisis caused by parasitic *qui tam* suits. Senator Langer observed that it appeared from the records of the cited lawsuits that the Government had been letting defendants plead to small criminal fines and leaving the civil damages and penalties untouched.[16] Noting that the opportunities for contractor fraud were greater than ever before, Senator Langer championed the *qui tam* actions as a way for citizens to act as a check on the Government, so that Government officials could not let favored individuals off lightly.[17]

When the measure proceeded to the Senate floor, this debate continued. On the one hand, Senator Van Nuys urged that the measure as amended by the committee would "stop racketeers, who are springing up like mushrooms all over the United States, from taking advantage of this antiquated statute."[18] On the other hand, Senator Langer questioned whether a problem with parasitic suits even existed. Pointing out that the committee had not contacted any of the parties or lawyers in these cases, he read into the record telegrams explaining the nature and extent of the fraud alleged in the cases, and efforts of relators to pursue fraud.[19] In his view, the current effort was an attempt "not merely to amend the act but to emasculate it to such an extent as to amount to its practical repeal."[20] Senator Langer was not alone in

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[15] *Id.* at 2-3.

[16] S. Rep. No. 291, Pt. 2, 78th Cong., 1st Sess. 1 (1943).

[17] *Id.* at 4.

[18] 89 Cong. Rec. 7439 (1943) (statement of Sen. Van Nuys).

[19] 89 Cong. Rec. 7578-79, 7601-02 (1943) (remarks of Sen. Langer).

[20] 89 Cong. Rec. 7438 (1943) (statement of Sen. Langer).

protesting the amendment. Other Senators pointed out that the proposed amendment created a catch-22 for potential relators because the person would have to give the information to the Attorney General before filing suit, but once the Government had the information, the person would be barred from bringing a suit.[21] Although efforts to recommit the measure were rejected,[22] the Senate did agree to delete the requirement that the relator's information be "original with such person." As one Senator explained, "taken literally," this language could be understood to prohibit a person from bringing or conducting a suit "unless all the information originated with himself."[23] There were no objections to the change, which would not have altered the expressed purpose of the amendment's sponsors, which was to preclude parasitic suits based on information about fraud that was already in the Government's possession.

The measure was sent to conference to reconcile the Senate and House proposals.[24] The amendment that emerged provided that if the United States proceeded with a case, the case would be prosecuted solely by the United States and the relator would have no role. If the United States failed to join the case after 60 days, the person could continue on his or her own. The Government had no ability to join the case at a later date. Critically, however, if the Government did not join the case, no court would have "jurisdiction" to proceed with a relator's case "whenever it shall be made to appear that such suit was based upon evidence or information in the

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[21] 89 Cong. Rec. 7614 (1943) (statements of Sens. Clark and Wheeler).

[22] 89 Cong. Rec. 7608, 7614-15 (1943).

[23] 89 Cong. Rec. 7614 (1943) (statement of Sen. Wheeler).

[24] 89 Cong. Rec. 7806 (1943).

possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[25]

As one congressman pointed out, this proposal placed "limitations upon the prosecution of true informer actions which defeat the very purpose and in practical effect nullify true informer suits."[26] He explained that, if a person with information about fraud was about to file an informer suit but was subpoenaed to testify before Congress, that person could not bring a suit because the Government would already have the information before the suit was brought.[27] "This is the vice of this [conference] report, or of this bill. Instead of encouraging the disclosure of frauds perpetrated against the Government, it places a premium upon secrecy, because what potential informer would dare disclose the information he had when he had not filed a suit if by disclosing it he is forever precluded from the prosecution of the action?"[28]

### C. In 1986 Congress Sought To Correct the 1943 Version of the Law By Carefully Crafting a Limited Bar to Certain Parasitic Suits.

While it was never clear how significant a problem parasitic suits were, predictions that the 1943 amendments would put an end to informer actions proved prescient. Following the 1943 amendment, courts construed the literal terms of the Act to preclude a *qui tam* action if the Government had information about the fraud in its possession, even if the relator had provided that information. *See United States ex rel. Lapin v. Int'l Bus. Machines Corp.*, 490 F. Supp. 244 (D. Haw. 1980); *United States v. Aster*, 275 F.2d 281 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960); *United*

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[25] H.R. Rep. No. 933, 78th Cong., 1st Sess. (1943), *reprinted in* 89 Cong. Rec. 10844 (1943); Act of December 23, 1943, ch. 377, 57 Stat. 608.

[26] 89 Cong. Rec. 10847 (1943) (statement of Rep. Miller).

[27] *Id.*

[28] *Id.*

*States v. Rippetoe*, 178 F.2d 735, 738 (4th Cir. 1949). Thus the provision was interpreted to effectively bar all suits the Government did not take over, including suits that were in no sense parasitic.

In a case that epitomized the way in which the exception undermined the Act itself, in 1984 the Seventh Circuit held in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), that the Government knowledge bar precluded the relator from bringing a *qui tam* action. In *Wisconsin v. Dean*, the only reason the Government was already aware of the fraud allegations contained in the relator's complaint was because the relator, the state of Wisconsin, had provided the information to the federal Government as required under another federal law. Precluding Wisconsin from pursuing the case did not protect the Government from a parasitic suit, but rather deprived the Government of a significant partner in pursuing a well-documented case of fraud. The United States had in fact wanted Wisconsin to proceed as the relator because Wisconsin was in the best position to prosecute the case.[29] Following the decision, the National Association of Attorneys General adopted a resolution to urge Congress to "rectify the unfortunate result of the *Wisconsin v. Dean* decision."[30]

At about the same time, members of Congress had begun to study the problem of fraud against the Government. The General Accounting Office had reported in 1981 that the known cases of fraud against the Government totaled between $100 million and $200 million, but that that number was likely very low because most fraud goes undetected.[31] The

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[29] *United States ex rel. Wisconsin v. Dean*, 123 F.2d at 1103, n.2.

[30] False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

[31] *See* S. Rep. No. 345, *supra* note 30, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (citing GAO Report to Congress, Fraud

Department of Justice informed Congress that fraud was draining between one and ten percent of the federal budget.[32] In an effort to stem this tide, Congress decided to revisit the Government's "primary weapon against fraud."[33] Examining the existing law, and finding a number of flaws, Congress set out to breathe new life into the law to "establish a solid partnership between public law enforcers and private taxpayers."[34]

Senate bill 1562, introduced on August 1, 1985,[35] would have amended the False Claims Act to, among other things, replace the 1943 "Government knowledge bar" which had undermined the *qui tam* provisions.[36] The proposed amendment would have replaced the Government knowledge bar with a more limited "public disclosure" bar. Under S. 1562 as introduced, a *qui tam* action could not proceed if it was based on specific evidence or information that the Government had disclosed as a basis of allegations in a prior administrative, civil, or criminal proceeding, or specific information disclosed during the course of a congressional

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in Government Programs: How Extensive is it? How Can it be Controlled? (1981)).

[32] S. Rep. No. 345, *supra* note 30, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268.

[33] 132 Cong. Rec. 20535 (1986) (statement of Sen. Grassley).

[34] 132 Cong. Rec. 28580 (1986) ("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars. The expanded *qui tam* provisions of this bill will serve to establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud.") (statement of Sen. Grassley).

[35] 131 Cong. Rec. 22322 (1985).

[36] *Id.* (observing that change was necessary in part because "the teeth of President Lincoln's law were removed during World War II, and the provision has been little used since") (statement of Sen. Grassley).

investigation or disseminated in the news media, unless the Government failed to act within a certain time.[37] If the Government intervened in the *qui tam* action, the bar would not have applied.[38] Unlike the 1943 bar, this proposal would not have prohibited the filing of a *qui tam* action simply because it was based on information somewhere in the vast Government bureaucracy.

The Senate Judiciary Committee reported a substitute measure, which the Senate adopted, along with some modifications.[39] Among other changes, the Senate proposal addressed the Department of Justice's concern that the *qui tam* provisions would give rise to a greater number of actions filed against public officials for political purposes. Accordingly, the Senate proposal provided that *qui tam* actions could not be brought against public officials if the Government already had the information about the fraud in its possession. This provision essentially retained the Government knowledge bar for suits against public officials.[40] In addition, the Senate proposal limited the reward for persons who brought an action based on information of fraud of which they did not have independent knowledge.[41]

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[37] S. 1562, *reprinted in* False Claims Reform Act: Hearing Bef. the Subcomm. on Admin. Prac. and Proc. of the Sen. Comm. on the Judiciary, 99th Cong., 1st Sess. (Sept. 17, 1986).

[38] *Id.*

[39] 132 Cong. Rec. 20530-42 (1986).

[40] S. Rep. No. 345, *supra* note 30, at 29, *reprinted in* 1986 U.S.C.C.A.N. at 5294 ("This provision actually reflects current law in that any *qui tam* suit based on information already known to the Government is currently without jurisdiction. While S. 1562 repeals that jurisdictional bar for most suits, the Committee, at the request of the Justice Department, retained the bar for those suits which might be politically motivated.").

[41] 132 Cong. Rec. 20536 (1986) (statement of Sen. Grassley).

The Senate proposal also altered the public disclosure bar to provide that no court would have jurisdiction over a *qui tam* action that was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[42] The proposal defined "original source" as an individual who has "direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government."[43] The exception would have allowed a *qui tam* action based on publicly disclosed allegations or transactions to be maintained by relators who, like the relator in the *Dean* case, brought information, independent of the public disclosure, to the Government.

The Senate subsequently adopted a revision to the definition of original source to require that the person "voluntarily provided the information to the Government before filing an action under this section which is based on the information," rather than before the Government filed an action.[44] This final version, which Congress adopted, barred a *qui tam* action based upon allegations or transactions publicly disclosed in certain Government proceedings or the news media, unless the person bringing the suit was an original source of the information on which the allegations in his own complaint were based, as Congress had defined that term.[45]

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[42] S. 1562, as amended, *reprinted in* 132 Cong. Rec. 20531 (1986).

[43] *Id.*

[44] 132 Cong. Rec. 28533 (1986).

[45] Pub. L. No. 99-562, 100 Stat. 3153 (1986).

## II. THE PUBLIC DISCLOSURE BAR PROVIDES A LIMITED FILTER TO PRECLUDE *QUI TAM* ACTIONS THAT ARE BASED UPON SPECIFIC FRAUD ALLEGATIONS ALREADY AVAILABLE TO THE GOVERNMENT IN ITS OWN PROCEEDINGS AND INVESTIGATIONS OR THROUGH THE NEWS MEDIA.

As the history of the public disclosure bar demonstrates, Congress intended this provision to serve a narrow purpose, and the original source exception was intended to make the bar more narrow still. If a *qui tam* suit is not parasitic, nothing in the Act, its legislative history, or the policies underlying it suggest that Congress had any interest in precluding it. The complex requirements that have been grafted onto this simple concept create a landscape of hidden pitfalls that can disqualify relators whose suits are clearly not parasitic, based on so-called "public disclosures" of which neither the relators nor the Government were, or could even reasonably be expected to be, aware. Such harsh and unjust results serve only to discourage relators with meritorious cases from taking the risk of coming forward, which is precisely the opposite of the statute's purpose.

### A. The Public Disclosure Bar Has no Application When the Government Joins the Case.

Because the public disclosure bar is intended to protect the Government's interest, the bar has never had any application to a *qui tam* action that the Government joins and decides to pursue on its merits. From its inception, the 1986 public disclosure bar was intended to arise only when the Government did not proceed with the case.[46] The final version of the public disclosure bar enacted into law expressly provides that the bar does not apply if the Attorney

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[46] *See supra* at 13-14, discussing S. 1562, 99th Cong., 2d Sess. (1986).

General brings the case, as occurs when the Attorney General elects to join and proceed with a *qui tam* action.[47]

Nothing in the text of the False Claims Act or its legislative history suggests that the public disclosure bar was ever intended to aid defendants in dismissing a *qui tam* relator from a case that the Government had joined and was pursuing on its merits. Under those circumstances, dismissing a relator at the defendant's request would serve only to deprive the Government of resources to assist it in pursuing the case, contrary to the purposes of the Act. To the extent the Government has concerns about the relator's participation or contribution to the case, the statute provides other ways for the Government to address those concerns.[48]

**B. The Public Disclosure Bar Precludes Only Parasitic Suits.**

The public disclosure bar was intended only to bar certain parasitic suits that did not contribute to the Government's knowledge about, and ability to pursue, claims against a

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[47] *See* 31 U.S.C. § 3730(e)(4); *see also* 31 U.S.C. § 3730(b)(4)(A) (providing that when the Government elects to proceed "the action shall be conducted by the Government"). Similarly, the 1943 Government knowledge bar came into play only if the Government declined the case. *See* Act of December 23, 1943, ch. 377, 57 Stat. 608. *See also United States v. Pittman*, 151 F.2d 851 (5th Cir. 1945) (holding that the 1943 bar did not apply when the Government pursued the case), *cert. denied*, 328 U.S. 843 (1946).

[48] *See, e.g.*, 31 U.S.C. § 3730(d) (providing courts discretion in making awards based upon the contribution of the relator); 31 U.S.C. § 3730(c)(2)(A) (authorizing the Government to dismiss action); 31 U.S.C. § 3730(d) (authorizing reduced relator's reward where *qui tam* complaint is based primarily on publicly disclosed information).

particular defendant.[49] For this reason, Congress limited the bar to situations in which a relator's complaint is based upon allegations or transactions that have been disclosed in a limited set of Government proceedings or the news media, where public disclosure of fraud allegations or transactions would mean that the federal Government and the general public were aware of the allegations.[50] There is no reason to assume that disclosures of fraud allegations in local government proceedings,[51] private lawsuits,[52] or other types of proceedings not listed in the statute make the federal Government aware of the fraud allegations and put it in a position to pursue them. Congress did not list those types of proceedings in the public disclosure bar because they were not relevant to the purpose of the section. Applying the public disclosure bar to these types of disclosures would expand the public disclosure bar even beyond the broad "Government knowledge bar" that Congress sought to replace.

Similarly, the primary fraud-fighting objective of the Act must be considered when determining whether a relevant "public disclosure" of "allegations or transactions" involving False Claims Act violations exists. To remain consistent with that purpose, the benchmark for determining whether one or more public "disclosure(s)" warrant invocation of the statutory bar must be whether such disclosures provide sufficient indication of fraud so that the Government and the general public reasonably can be expected to have been

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[49] 145 Cong. Rec. 16025, 16031 (1999) (reprinting letter from Rep. Berman and Sen. Grassley to Attorney General Reno).

[50] *See* 31 U.S.C. § 3730(e)(4)(A).

[51] *See, e.g., A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir.), *cert. denied*, 529 U.S. 1099 (2000).

[52] *See, e.g., United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998).

alerted to the need for the Government to investigate specific conduct or transactions. Barring *qui tam* suits based on any public disclosure that fails to meet this minimum standard of disclosure defeats rather than serves the overriding interest of the United States in effectively combating fraud.

Thus, for example, mere awareness on the part of the Government that a particular type of fraud occurs, without information that a specific defendant engaged in that conduct, does not put the Government in a position to pursue a case. The Government is well aware that practices such as overbilling, or failure to test, do occur in certain industries. It is unrealistic to conclude, however, that awareness that a general practice occurs means the Government is aware of fraud by a particular defendant and is in a position to pursue it.[53]

When a public disclosure occurs in one of the fora enumerated in the Act, specific allegations of fraud committed by identifiable wrongdoers obviously provide the level of notice necessary to alert the Government and spur it to action. Determining whether exposure of bits and pieces of information about "transactions" suffices to trigger the Act's public disclosure bar must begin with consideration of the extent to which the "disclosure(s)" at issue actually can be expected to have provided the kind of alert needed to effectively combat fraud. As the D.C. Circuit correctly noted, pieces of information about a defendant and some of its actions, even when publicly disclosed, rarely add up to an allegation of fraud. There must be "enough information . . .

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[53] False Claims Act Implementation: Hearing Bef. the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 6 (1990) ("The publication of general, non-specific information does not necessarily lead to the discovery of specific, individual fraud which is the target of the *qui tam* action.") (statement of Sen. Grassley).

in the public domain to expose the fraudulent transaction."[54] This analysis, however, cannot always be reduced to a simple, formulaic inquiry. Even if all the critical elements of the fraud or the fraudulent transaction appear somewhere in the public domain, if the information needed to piece together a discernible picture of actionable fraud must be gathered from several places, it may be unrealistic to assume that the Government is aware or likely to become aware of the apparent fraud. The issue remains whether clear enough indications or allegations of fraud were disclosed in one of the ways Congress specified in the Act so that the Government can proceed with the case if it wants, or be held accountable if it does not. A relator who collects and analyzes dispersed public information and brings an otherwise unrecognized fraudulent transaction to light is not a parasite. Congress intended to encourage such persons to bring the fruits of their labor to the Government's attention.[55]

### C. The Original Source Exception Prevents the Public Disclosure Bar from Excluding Persons Who Brought to the Government Their Own Information That Was Independent of the Public Disclosure.

The original source exception to the public disclosure bar serves a very limited function under the False Claims Act. Like the relator in *Wisconsin v. Dean*, some relators whose complaints are based on allegations or transactions of fraud that have been publicly disclosed are not parasites. A person's disclosure of information to the Government could itself result in a public disclosure, as, for example, when a criminal

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[54] *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).

[55] *See United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (observing that "to a certain degree, Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud").

indictment was the result of the relator's information. A leak to the press about a Government investigation based on information provided by a relator could also result in a public disclosure. Under these circumstances, Congress did not want the relator to be barred from bringing a *qui tam* case.[56] Such relators are precisely the types of individuals the Government should reward.

Congress expressly decided not to limit the original source exception to persons whose information led to the particular public disclosure.[57] Congress adopted a specific definition of "original source" that requires only that the information upon which the relator bases the allegations in his or her complaint be provided to the Government before the relator files suit.[58] The reason Congress required no more is clear. If before filing suit, the relator provides to the Government direct information about the allegations in his complaint that is independent of the publicly disclosed allegations, that suffices to demonstrate that the person's *qui tam* action is not parasitic. Such a case does not implicate the concerns underlying the public disclosure bar, even though the complaint involves publicly disclosed allegations or transactions of fraud. Congress also recognized that in some cases this could potentially result in a relator proceeding in a case that was based only in small part on his or her own information. The statute addresses this concern as well, by permitting a lesser reward when the action is primarily based on publicly disclosed allegations or transactions of fraud.[59]

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[56] 145 Cong. Rec. 16025, 16031 (1999) (reprinting letter of Rep. Berman and Sen. Grassley to Attorney General Reno).

[57] *See, e.g., United States ex rel. Longstaffe v. Litton Industries, Inc.*, 296 F. Supp. 2d 1187 (C.D. Cal. 2003) (requiring relator to be the source of the disclosure).

[58] 31 U.S.C. § 3730(e)(4)(B) (requiring that information be provided to the Government "before filing an action" based on the information).

[59] 31 U.S.C. § 3730(d).

Because the original source requirement serves the narrow function of ensuring that persons who bring their own information to the Government before filing suit are not improperly filtered out by the public disclosure bar, as they were under the 1943 version of the law, no stringent requirements are necessary to qualify as an original source. There is no need for a person to have seen the fraud with his or her own eyes or to have received no information from other people or sources. Someone who sees a fraudulent transaction take place has direct and independent knowledge of the fraud, but that is not the only way such knowledge may be obtained. For example, a relator who learns of false claims by gathering and comparing data could have direct and independent knowledge of the fraud, regardless of his or her status as a percipient witness to the fraud and regardless of whether some of the information was filtered through other people. The purpose of the original source inquiry is simply to confirm that the person's complaint, which was based on publicly disclosed allegations or transactions of fraud, was not in fact parasitic because the person had his or her own information about the fraud that was not dependent upon the public disclosure. Congress had no interest in preventing persons with their own information about fraud from assisting the Government in its efforts to pursue that fraud.

## CONCLUSION

The False Claims Act balances the need for information with concerns about opportunistic behavior, but the 1986 amendments did not assign equal weight to those interests. The overriding purpose of the Act is to enlist the information and resources of the public to assist the Government in pursuing fraud. The 1986 Amendments have been highly effective in achieving those goals.

As Congress recognized in 1986, "[t]he Federal Government has a big job on its hands as it attempts to ensure the integrity of the nearly $1 trillion we spend each year on various programs and procurement. That job is simply too big

if Government officials are working alone."[60] Reading the public disclosure bar too broadly, and the original source exception too narrowly, undermines the central purpose of the *qui tam* provisions of the Act.

Where the Government joins a *qui tam* case, no jurisdictional bar based on potential public disclosure can apply. The Act provides other tools to protect the Government's interests in cases in which it intervenes despite potential public disclosures. In a non-intervened case, once a court has found that the complaint is based upon allegations or transactions of fraud disclosed in one of the ways enumerated in the statute (and is therefore potentially parasitic), the only issue is whether the person brought supporting information, about which he or she had direct knowledge independent of the public disclosure, to the Government before filing the case. A person who merely copied an indictment or a government report would not have such direct and independent knowledge. If the person did have direct information about fraud independent of the public disclosure, then the goal underlying the public disclosure bar, precluding parasitic suits, is not implicated and Congress had no interest in barring the suit.

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[60] 132 Cong. Rec. 20535 (Aug. 11, 1986) (statement of Sen. Grassley).

Respectfully submitted,

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November 20, 2006

No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

*Respondents.*

On a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

## BRIEF OF *AMICI CURIAE* PATRICIA HAIGHT AND IN DEFENSE OF ANIMALS IN SUPPORT OF RESPONDENTS


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November 2006

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

STATUTORY PROVISION INVOLVED ..... 3

ARGUMENT ..... 3

1. The Original Source Provision is an Exception to the Statutory Bar of Parasitic *Qui Tam* Actions, it is Not a Free-Standing Requirement that Relators be "Insiders" and "Whistleblowers" With Prior Knowledge of the Fraud. ..... 3

2. Since the Government Intervened in *Rockwell*, the Statutory Bar of Parasitic *Qui Tam* Actions Does Not Apply; and this Court Need Not Reach the Question of Original Source. ..... 8

3. If the Court Reaches the Question of Original Source Status, it Should Hold Direct Knowledge is Shown When the Relator Contributed to the Discovery of the Fraud by Disclosing Information to the Government Learned Through his Direct and Independent Investigatory Efforts. ..... 12

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

Cases

*Cooper ex rel. United States v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994) ..... 12

*Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978) ..... 1, 2, 3, 5, 8, 9, 11, 12

*Seal 1 v. Seal A*, 255 F.3d 1154 (9th Cir. 2001) ..... 14

*United States ex rel. Aflatooni v. KITSAP Physician's Services*, 163 F.3d 516 (9th Cir. 1999) ..... 15

*United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010 (E.D. Va. 1995) ..... 7

*United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996) ..... 13, 14

*United States ex rel. Fine v. Chevron*, 39 F.3d 957 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*) ..... 13

*United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006) ..... 1, 2

*United States ex rel. Hansen v. Cargill, Inc.*, 107 F.Supp.2d 1172 (N.D. Cal. 2000), *aff'd* 26 Fed. Appx. 736 (9th Cir. 2002) ..... 13, 14

*United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014 (9th Cir. 1999) ..... 13, 15

*United States ex rel. Hartigan v. Palumbo Bros., Inc.*,
797 F. Supp. 624 (N.D. Ill. 1992) ..... 8, 14

*United States ex rel. Lamers v. City of Green Bay*,
168 F.3d 1013 (7th Cir. 1999) ..... 13, 14

*United States ex rel. Marcus v. Hess*,
317 U.S. 537 (1943) ..... 4, 7, 16

*United States ex rel. Schumer v. Hughes Aircraft Co.*,
63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*,
520 U.S. 939 (1997). ..... 7

*United States ex rel. Springfield Terminal Ry. Co. v Quinn*,
14 F.3d 645(D.C. Cir. 1994) ..... 12, 14, 15

*United States ex rel. State of Wisconsin v. Dean*,
729 F.2d 1100 (7th Cir. 1984) ..... 4-8, 14, 16

*United States ex rel.Garibaldi*, 21 F. Supp. 2d 607
(E.D. La. 1998), *rev'd on other grounds* 244 F.3d 486
(5th Cir. 2001) ..... 15

*United States v. Pittman*, 151 F.2d 851 (5th Cir. 1945) 10, 11

*Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ..... 6

Statutes

31 U.S.C. §3730(a) ..... 9

31 U.S.C. §3730(b) ..... 1, 9

31 U.S.C. §3730(d) ..... 2, 8-10

31 U.S.C. §§3730(e)(1), (2) & (3) ..... 9

31 U.S.C. §3730(e)(4) ..... *passim*

False Claims Act, former 31 U.S.C. §232(C) ..... 4

Other Authorities

S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 6, 7, 11

## INTEREST OF *AMICI CURIAE*[1]

Patricia Haight and In Defense of Animals are *qui tam* relators in a False Claims Act (FCA) case entitled *United States ex rel. Haight v. Catholic Healthcare West*, which was decided in the Ninth Circuit and reported at 445 F.3d 1147. Currently, defendants in the *Haight* action have pending a petition for a writ of certiorari (Case No. 06-282), and *qui tam* relators have filed a conditional cross petition (Case No. 06-473). Although the "original source" question was not reached in *Haight*, nor presented in the pending cross petitions, *Haight* involves application of the statutory bar against parasitic *qui tam* actions embodied in 31 U.S.C. §3730(e)(4). *Amici curiae* Haight and In Defense of Animals therefore have a strong interest in assisting the Court in its interpretation and application of the statutory bar against parasitic actions.

Dr. Haight served as Southwest Regional Director at In Defense of Animals, an animal welfare advocacy organization. In their *qui tam* action filed under §3730(b), relators in *Haight* allege that scientists at a private research institution submitted a false and fraudulent grant application to the National Institutes of Health (NIH) in order to secure federal funds. Dr. Haight did not work for defendants, but she discovered the falsity of the defendants' representations to NIH through her own, independent investigatory efforts.

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[1]All parties have consented to the filing of this brief. Petitioner's general consent is on file, and letters of consent from the Solicitor General and *qui tam* relator have been lodged with the Court. *Amici curiae* represent that their own counsel wrote this brief and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

In the district court and in the Ninth Circuit, defendants in *Haight* contended that the statutory bar of parasitic *qui tam* actions, §3730(e)(4), applied; and that relators could not qualify as original sources unless they were "true insiders" who had seen the entirety of the fraud with their own eyes. Relators responded that there is no statutory requirement that an original source be an "insider," arguing that criteria for the exception to the statutory bar are met when the relator makes a meaningful contribution to the discovery of the fraud through her own direct and independent investigatory efforts. Because the Ninth Circuit found that there was no public disclosure triggering the statutory bar, it did not need to reach the original source issue.

Dr. Haight and In Defense of Animals file this *amici curiae* brief in support of respondents in this case to urge the Court to interpret the original source doctrine consistent with the clear statutory purpose of §3730(e)(4). That purpose is to bar parasitic *qui tam* actions – when the relator bases the allegations upon the investigatory coattails of the government's investigation. The "original source" exception was incorporated into the 1986 Amendments for the purpose of avoiding improper application of the statutory bar, in direct response to the case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). *Amici* maintain that original source status is shown when the relator contributes to the discovery of the fraud through his own direct and independent investigatory efforts.

*Amici* also maintain that once the Attorney General intervenes in the action, as occurred in *Rockwell*, the statutory bar no longer applies. Indeed, the government intervention exception is on equal statutory footing in §3730(e)(4)(A) with the original source exception. After intervention, disputes over the relator's contribution to the discovery of the fraud are addressed in the bounty provisions of §3730(d)(1).

## STATUTORY PROVISION INVOLVED

31 U.S.C. §3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

## ARGUMENT

### 1. The Original Source Provision is an Exception to the Statutory Bar of Parasitic *Qui Tam* Actions, it is Not a Free-Standing Requirement that Relators be "Insiders" and "Whistleblowers" With Prior Knowledge of the Fraud.

Rockwell International and *amici curiae* supporting petitioner ask this Court to interpret the statutory bar in §3730(e)(4) to require all relators under the FCA to be "insiders" and "true whistleblowers" with full knowledge of the details of the fraud prior to their disclosures to the government. These contentions have no textual basis, are greatly misguided, and lie at the base of much confusion in the federal courts.

*Amici* here instead suggest the Court interpret the "original source" provision consistent with clear congressional purposes: first, to prohibit only parasitic *qui tam* actions; and second, to create an exception when the relator is an original source of information to the government.

As gleaned from the history of the False Claims Act and its amendments, the "public disclosure" provision was drawn as a narrow bar of parasitic lawsuits, where the relator derives knowledge of the fraud as a result of the government's (or news media's) investigation. These were the precise elements of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). It is also clear that the "original source" exception was an express response to the circumstances in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

Known originally as "Lincoln's Law," the FCA was passed during the Civil War to help recover government funds lost through fraud and waste. In its initial form, it contained *qui tam* provisions authorizing private persons to enforce the statute's proscriptions, without limitation as to who could serve as relator. In 1943, the Supreme Court permitted recovery by a *qui tam* relator who merely filed a civil FCA action based upon a copy of a criminal indictment that had already been filed by the government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). Seen as an example of a parasitic lawsuit – one where the relator bases the *qui tam* action on the government's own investigatory labor – Congress that year acted to correct the problem in *Hess* with an express statutory bar.

Congress added the FCA's first version, formerly codified at 31 U.S.C. §232(C), precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Courts interpreted the 1943 bar to apply only when

> the evidence and information in possession of the United States ... was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978).

The problem with the 1943 version of the bar was that it went too far, foreclosing operation of the important *qui tam* enforcement provisions whenever the government possessed knowledge of the fraud. Even when the government had such information, officials might determine for lack of resources or political will not to seek remedies. Moreover, in applying the 1943 law, courts relied upon the "government knowledge" bar to dismiss actions even when it was clear the relator was not a "parasite" – for example when the government had gained information relating to alleged false claims as a result of the disclosures of the relator.

In the seminal case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984), the Seventh Circuit reviewed the legislative history of the 1943 amendments in detail, rejecting the state relator's request for an exemption from the "government knowledge" bar. Wisconsin had already investigated and convicted the defendant of Medicaid fraud, and pursuant to regulations had reported information supporting the fraud to the federal government. The court noted that, while a draft of the senate bill for the 1943 amendment would have permitted a *qui tam* action despite government knowledge when the relator was an original source to the government, it also noted that the house version would have abolished *qui tam* actions all together. Because the final compromise in the 1943 amendment retained *qui tam*

enforcement, enacted the government knowledge bar and omitted any exception for an original source, the Seventh Circuit in *Dean* concluded that Wisconsin could not maintain the *qui tam* action. It noted that any exemption should be obtained expressly from Congress. *Dean*, 729 F.2d at 1106.

In 1986, in the midst of increasing concern over fraud, Congress amended the FCA's prohibition of parasitic suits. In the 1986 version, Congress sought to overturn the federal courts' "severely restrictive interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law: that the *qui tam* provisions were designed to assist the government only when it did not know of the fraud. It also dispensed with the idea that, in order to be a true relator, the *qui tam* plaintiff must bring new information of the fraud to the government. The 1986 *qui tam* provisions eliminated the "government knowledge" bar, and put in its place another bar which expressly authorized relators to enforce the FCA, even in those cases where the government knows of the fraud and chooses not to pursue it, and even when the relator adds to the mix no new information on the fraud.

> [I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." ... S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct.

*United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

That Congress had *Marcus v. Hess* in mind when it amended the bar in 1986 is made clear by the fact that *each* of the four elements in *Hess* was made an express requirements:

> (1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.
>
> (2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.
>
> (3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims; as occurred in *Hess* when the information in the indictment expressly stated the fraud.
>
> (4) The medium of the disclosure must be one of the specified fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

That Congress had *Wisconsin v. Dean* in mind when it enacted the "original source" exception is made clear not only by the plain text – which expressly incorporates the language proposed but ultimately omitted from the 1943 amendments, as noted in *Dean* – but also by its legislative history. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, at 5277-78 (noting that Congress had been strongly urged to "rectify the unfortunate result of the *Wisconsin v. Dean* decision"). *See also United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020

(E.D. Va. 1995) ("The legislative history of the 1986 amendments demonstrates congress's clear intent to overrule *Dean* and to make it easier for private citizens to enforce the FCA"); *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 630 (N.D. Ill. 1992) ("It is clear from the legislative history that Congress specifically sought to reverse the Seventh Circuit's decision in *Dean* so that suits could be brought by relators, such as the State of Wisconsin, whose independent investigation uncovered the information of fraud on the Government").

To the extent that petitioners and their *amici* claim that the original source doctrine requires relators to have direct and independent knowledge of all of the fraud prior to making any disclosures to the government, their arguments run contrary to the true the statutory purpose of §3730(e)(4). That statutory bar is intended to prohibit parasitic *qui tam* actions, and to create an exception for relators who made a meaningful contribution to the government's investigation. Encouraging relators to come forward with information of fraud is the statutory purpose of the bounty provisions, §3730(d). Reducing the bounty to relators who make small or no contribution to the discovery of the fraud is the statutory purpose of §3730(d)(1). But the only purpose of §3730(e)(4) is to bar parasitic actions.

**2. Since the Government Intervened in *Rockwell*, the Statutory Bar of Parasitic *Qui Tam* Actions Does Not Apply; and this Court Need Not Reach the Question of Original Source.**

Necessarily included in the broadly worded question presented in the petition for a writ of certiorari (whether the Tenth Circuit erred by entering judgment on in its application of the "original source" doctrine of §3730(e)(4)) is the question of whether relator Stone need satisfy the "original source"

requirement at all. In *Rockwell*, the Attorney General has intervened and is prosecuting the action on behalf of the United States. Contrary to the Tenth Circuit's opinion, once the action is brought by the government, the statutory bar of parasitic *qui tam* actions no longer applies. The judgment should therefore be affirmed on the alternative ground that the bar is inapplicable.

On equal statutory footing with the original source exception in §3730(e)(4) is the exception for actions that are "brought by the Attorney General." Clearly, when Congress amended the parasitic *qui tam* action bar, it did not intend the bar to apply when the government exercises its option to bring an action by intervention. Had Congress intended the Attorney General exception to the statutory bar of parasitic actions to apply only when the government brings the action in the first instance, and not when it intervenes, it would have expressly distinguished between §3730(a), which authorizes those direct and exclusive actions, and §3730(b)(4), which authorizes intervention. Indeed, when Congress wanted to restrict statutory bars to *qui tam* actions brought under §3730(b), it said so expressly. *See* §§3730(e)(1), (2) & (3). By referring to instances when the action "is brought by the Attorney General" rather than expressly to §3730(a), Congress created an independent exception for actions brought by the Attorney General after intervention under 3730(b)(4).

Congress chose to deal with the problem of parasitic actions when the government intervenes by limiting the amount that the relator can recover, not by depriving the court of jurisdiction to hear the entire case. In the bounty provision of §3730(d)(1), Congress created a sliding scale – permitting recovery between 0% and 10% – for a bounty paid to relators who make no meaningful contribution to the discovery of the fraud. That Congress permitted this recovery only when the government intervened, shows its intention to allow actions

based on public disclosures to go forward, even by non-original source relators, when the Attorney General takes over the case.

Application of the Attorney General exception fulfills the purpose of allowing a *qui tam* enforcement, even when the relator is parasitic, because the government itself has determined that the action is worth pursuing. No purpose would be served by preventing the government from prosecuting the action based upon the *qui tam* relator's original source status. Because the statutory bar applies to entire "actions," rather than parties, the bar restricts the jurisdiction of the court to hear the entire case, not the relator's ability to participate. Any concern over an unfair recovery by an opportunistic relator can be dealt with by limiting the amount of bounty recovered under §3730(d)(1).

Application of the attorney general exception in cases of intervention is warranted by the legislative history of the 1986 amendments. Prior to those amendments, courts interpreted the 1943 statutory bar to apply only when the government chose not to intervene in the action. For example, in *United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945), the court found it "wholly unreasonable to think that Congress intended that after the Attorney General appears and takes over for the United States the prosecution of a fraud claim because he thinks the claim a valid one, the United States should be cut off from a trial on the merits and the culprit should escape" on the basis of the statutory bar. "The intention was to discourage the carrying on of suits by undeserving relators; not to nullify the just claims of the United States when the Attorney General takes over the case in behalf of the United States." *Id.*

In the senate bill for the 1986 amendments, this holding by *Pittman* was expressly cited, where the authors made clear their belief that the jurisdictional bar does not apply in cases where the Attorney General intervenes in the *qui tam* action:

> The Senate specifically provided that jurisdiction would be barred on qui tam suits based on information in the possession of the Government unless the relator was the original source of that information. Without explanation, the resulting conference report dropped the clause regarding original sources of allegations and courts have since adopted a strict interpretation of the jurisdictional bar as precluding any qui tam suit based on information in the Government's possession, despite the source. That jurisdictional bar, however, has been applied only to private *qui tam* suits, and not those suits taken over by the Government. [*United States v. Pittman*].

S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, at 5277.

In light of this legislative history, there can be no question that the Attorney General exception to the parasitic *qui tam* action bar applies in this case. The rule in *Pittman* was clearly established prior to the 1986 amendments, and the authors of the 1986 amendments expressly noted the rule as existing law in the Senate Report. Even the holding of *Pittman* – foreclosing operation of the bar when the Attorney General intervenes – was incorporated into the text of the 1986 amendments. Judgement should be affirmed in this case, not only because relator Stone is an original source, but because the intervention of the Attorney General moots the inquiry under §3730(e)(4), as the case qualifies for the other, independent exception to the bar of parasitic *qui tam* actions.

**3. If the Court Reaches the Question of Original Source Status, it Should Hold Direct Knowledge is Shown When the Relator Contributed to the Discovery of the Fraud by Disclosing Information to the Government Learned Through his Direct and Independent Investigatory Efforts.**

Since amendment of the statutory bar in 1986, federal courts have struggled with the question of how much information must be possessed by a relator to qualify him or her as an "original source." Most courts, reasonably enough, conclude that, to be "an" original source, a relator need not possess all of the information underlying the complaint. As explained by the D.C. Circuit:

> §3730(e)(4)(B) does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent *transaction*. ... Rare indeed would be the case in which relators could gain "original source" status, if such were the standard. *United States ex rel. Springfield Terminal Ry. Co. v Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994) (original emphasis)

*Amici* suggest that, in the event that the question of original source is reached in this case, the Court adopt an interpretation consistent with the statutory purpose of preventing truly parasitic *qui tam* actions. The original source exception should be interpreted to apply to any *qui tam* action when the relator made a meaningful contribution to the discovery of the fraud based upon information obtained through his own direct and independent investigatory efforts. In so holding, this Court should dispense with any requirements that the relator be an "insider" or "true whistleblower," as neither is written into the statutory bar nor consistent with its purpose.

In the Ninth Circuit, the court has adopted the view that "direct and independent knowledge" constitutes two separate requirements for original source status. A relator's knowledge is independently obtained when it is acquired prior to the disclose of allegations or transactions of fraud in one of the specified public fora. *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999); *United States ex rel. Hansen v. Cargill, Inc.*, 107 F.Supp.2d 1172, 1182 (N.D. Cal. 2000), *aff'd* 26 Fed. Appx. 736 (9th Cir. 2002). Knowledge is direct when the relator "discovered the information underlying his allegations of wrongdoing through his own labor." *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 360 (9th Cir. 1996). Both of these requirements, as stated, are consistent with the purposes of the statutory bar. Neither requirement should be interpreted to mean that an original source must have been an "insider" who sees the entirety of the fraud "with his own eyes."

Numerous circuits hold that information obtained through a relator's own investigation leads to "direct" knowledge. In *United States ex rel. Fine v. Chevron*, 39 F.3d 957 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*), the Ninth Circuit held a relator gained "direct and independent" knowledge of the information by his own labor when he reviewed audit sheets and financial records. In *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017-18 (7th Cir. 1999), the Seventh Circuit found a Green Bay citizen who independently investigated fraud by monitoring information that was available to everyone – bus routes – to be an original source. In *Cooper ex rel. United States v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994), the Eleventh Circuit held the relator to be an original source on the basis of a three-year investigation that included his own claims processing, research and

correspondence. In *Springfield Terminal Ry.*, 14 F.3d at 657, the D.C. Circuit found direct and independent knowledge when the relator "bridged the gap by its own efforts and experience." And in *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 630-31 (N.D. Ill. 1992), a relator who undertook an investigation on his own initiative was found to have "direct" knowledge.[2]

Courts which have found direct knowledge lacking under the "original source" exception often predicate their rulings on the lack of meaningful contribution by the relator to the discovery of the fraud. For example, in *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996), original source status was denied because the relators conducted only a *de minimus* investigation and based their allegations almost entirely on an admission of fraud by a third party. *See* 84 F.3d at 362 (relators "did not make a genuinely valuable contribution to the exposure of the alleged fraud"). Similarly, in *Seal 1 v. Seal A*, 255 F.3d 1154, 1163 (9th Cir. 2001), "direct knowledge" was found lacking because the relator had learned of the allegations of fraud from the government's own investigation. It was the Department of Justice attorneys who told relator about the fraud; he "played no active role in any government investigation, and [he] obtained his information ... from the government" (*id*). Similarly, in *Carghill*, 107 F.Supp.2d at 1183, Judge Breyer found that the relator had relied upon the reports of the state audit agency to formulate his allegations, merely adding legal conclusions to facts already gathered and shown in specified public fora.

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[2]The Seventh Circuit in *Lamers*, 168 F.3d at 1018, called this conclusion a "no-brainer," given *Hartigan*'s similarities to *United States ex rel. Wisconsin v. Dean*, 729 F.2d at 1104, which the 1986 Act sought to overturn.

Other instances of when the relator failed to establish original source status have occurred due to the failure of the relator's testimony. In *United States ex rel. Aflatooni v. KITSAP Physician's Services*, 163 F.3d 516, 521 (9th Cir. 1999) the court noted the relator could not recall any of the key witnesses, his claims of fraud were mere "speculation," his allegations amounted to no more than negligence, and his expert consultant provided no foundation for his conjectures. Similarly, the relator in *Alcan*, 197 F.3d at 1021, could offer no more evidence of his knowledge than his status as a member of the union.

While a relator, to qualify as an original source, must be able to provide sufficient testimony indicating direct and independent knowledge of information disclosed to the government, the Court should not broaden those requirements to frustrate the purpose of the statutory bar. In particular, the Court should not require direct knowledge on the part of the relator to mean that no information be obtained from documents or third parties. Indeed, it is impossible to conceive of any individual who could obtain knowledge of another's fraud on the government without examining information contained in documents or revealed in communications with others. Clearly, original source status exists even when information is gathered from documents and interviews. *See Springfield*, 14 F.3d at 657 (relators "bridged the gap" by reviewing documents and conducting interviews with individuals and businesses). Indeed, Barring relators who investigate their actions by reviewing documents and talking to others would surely eviscerate the FCA. "Were this the case, an actual living person would almost never be an original source, and *qui tam* actions would have to be filed by the books and ledgers themselves." *United States ex rel. Garibaldi*, 21 F.Supp.2d 607, 616 n.3.(E.D. La. 1998), *rev'd on other grounds* 244 F.3d 486 (5th Cir. 2001).

*Amici curiae* Haight and In Defense of Animals therefore urge this Court, if it reaches the definition of original source, to interpret that exception consistent with the underlying purpose of the statutory bar. Because Congress intended to bar only truly parasitic *qui tam* actions – such as the one in *Marcus v. Hess* – and also created an exception for any relator who qualifies as an original source – such as Wisconsin in *Dean* – the statutory bar should not be interpreted to require relators to be "insiders" or "true whistleblowers." To qualify as an original source, the relator must have contributed to the discovery of the fraud and to have disclosed his information without compulsion by legal process to the government, based upon knowledge obtained through his own direct and independent efforts.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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November 2006

465B

(9)

Supreme Court, U.S.
FILED
OCT 26 2006
OFFICE OF THE CLERK

No. 05-1272

# IN THE
# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

*Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

## BRIEF FOR THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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OCTOBER 2006

## QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. THE TENTH CIRCUIT'S DECISION EVISCERATES THE ORIGINAL SOURCE REQUIREMENT AS AN ESSENTIAL CHECK ON ABUSIVE *QUI TAM* SUITS ..... 3

II. THE TENTH CIRCUIT'S APPROACH WOULD ADVERSELY AFFECT THE GOVERNMENT'S PROCUREMENT OF MILITARY EQUIPMENT AND SERVICES ..... 9

A. *Qui Tam* Suits Arising Out of Public Debate Over Advanced Military Equipment ..... 10

B. *Qui Tam* Suits Based on Publicly Disclosed Disagreements About Technical Regulatory Matters ..... 12

C. *Qui Tam* Suits Arising Out of Internal Investigations and Voluntary Disclosures 14

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Boeing North American, Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002) ..... 9

*Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) 11

*Dingle v. BioPort Corp.*, 388 F.3d 209 (6th Cir. 2004) .... 11

*Fluor Hanford, Inc. v. United States*, 66 Fed. Cl. 230 (2005) ..... 9, 14

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) ..... 12

*United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) ..... 3

*United States ex rel. Kreindler & Kreindler v. United Technologies. Corp.*, 985 F.2d 1148 (2d Cir. 1993) ..... 11

*United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35 (D. Mass. 1995) ..... 10

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Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237 (1995) ..... 7, 14

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U.S. Gov't Accountability Office, *Information on False Claims Act Litigation: Briefing for Congressional Requesters* 26 (2005) ..... 1

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## INTEREST OF AMICUS CURIAE[1]

The National Defense Industrial Association ("NDIA") is a nonprofit organization comprising over 1,200 corporations and 39,000 individuals from the defense industry. Many of NDIA's members manufacture military weapons and equipment and contract with the U.S. Department of Defense. NDIA's members fulfill a substantial share of the Defense Department's contracts for goods and services.

In the past twenty years, nearly a third of *qui tam* suits involved claims that had been submitted to the Department of Defense. *See* U.S. Gov't Accountability Office, *Information on False Claims Act Litigation: Briefing for Congressional Requesters* 26 (2005). New military weapons systems are becoming more complex and consume an increasing share of the defense budget, and the military is increasingly dependent on private firms to supply vital services. In these circumstances, False Claims Act suits against the defense industry are likely to proliferate.

NDIA members, like other False Claims Act defendants, rely on the Act's jurisdictional requirements to prevent *qui tam* suits based solely on public information. NDIA's members are concerned that the Tenth Circuit's

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[1] The parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk. *See* Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than NDIA or its members contributed money to the preparation or submission of the brief. A list of NDIA members is available at http://www.ndia.org. Although Petitioners' successor by merger, The Boeing Company, is a member of NDIA, The Boeing Company has not contributed any money to the preparation or submission of this brief.

decision eviscerates the first line of defense against *qui tam* suits that the Government has declined to pursue. Such suits, even if ultimately dismissed on the merits, significantly burden the process of competing for and fulfilling defense contracts and ultimately compromise the military's access to state-of-the-art supplies and services.

## SUMMARY OF ARGUMENT

When it enacted the False Claims Act, Congress "walk[ed] a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). In diluting a critical check on *qui tam* abuses, the Tenth Circuit's decision ignores the plain language of the statute and increases the risk of opportunistic behavior that will harm the defense industry and the U.S. military.

The costs imposed by such actions—in which the Government, after public disclosure of the facts on which the relator's action is based, has exercised its prosecutorial discretion and declined to bring suit—are likely to have adverse consequences on the defense industry. Defense firms may become more wary of supplying technically-advanced military equipment that could generate public debate over the equipment's efficacy. Firms are also likely to pass along to the Government the costs of fighting the increased number of nonmeritorious *qui tam* suits that the Tenth Circuit's rule may foster. The increased number of such suits may also have the perverse effect of discouraging defense firms and their employees from promptly and voluntarily investigating and reporting potential problems with contracts.

## ARGUMENT

### I. THE TENTH CIRCUIT'S DECISION EVISCERATES THE ORIGINAL SOURCE REQUIREMENT AS AN ESSENTIAL CHECK ON ABUSIVE *QUI TAM* SUITS

The False Claims Act denies federal courts subject matter jurisdiction to hear *qui tam* suits "based upon the public disclosure of allegations or transactions" underlying the lawsuit. 31 U.S.C. § 3730(e)(4). This jurisdictional limitation—known as the "public disclosure bar"—is subject to an exception known as the "original source rule." Under this original source exception, a relator whose suit is based on public information may proceed only if he has "direct and independent knowledge of the information on which the allegations are based." *Id.* § 3730(e)(4)(B).

A. Contrary to the Tenth Circuit's decision, Stone (the relator in this case) did not have "direct and independent knowledge of the information" on which his False Claims Act allegations were based. Referring to its earlier opinion in *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999), the Tenth Circuit "drew a distinction between the actual act of fraud, *i.e.*, the actual submission of inaccurate claims by Rockwell to DOE, and the facts underlying or which gave rise to the fraud, *i.e.*, ***the environmental, health and safety violations themselves***." Pet. App. 21a (emphasis added).

But the court then dismissed the significance of whether Stone had any direct and independent knowledge of "the environmental, health and safety violations themselves." Because Stone was terminated by Rockwell before any environmental violations occurred, his only "in-

formation" about violations was an "Engineering Report" in which he opined that the "design proposed by Rockwell management for making pondcrete . . . would result in an unstable mixture that would later deteriorate and cause unwanted release of toxic wastes to the environment." *Id.* at 18a (quotations and emphasis omitted).

The court then dismissed as "immaterial" Rockwell's uncontested argument that the alleged defects in design Stone identified did not cause defects in the pondcrete blocks. *Id.* at 22a. The court offered this explanation:

> For a relator to be properly qualified as an original source, he must have had direct and independent knowledge of the information on which his claim is based. But whether that claim is ultimately flawed on the merits is an analytically distinct question from the one mandated by the [False Claims Act] for establishing jurisdiction. It is for the finder of fact to determine whether the plaintiff's theory has merit; to satisfy the direct and independent prong of the original source test, relator need only show that he possessed direct and independent knowledge of the information upon which his claim is based, not that his claim is factually correct.

*Id.*

Under the Tenth Circuit's approach—which never came to grips with whether Stone in fact had "direct and independent knowledge" of the environmental violations—an employee whose opinions, comments or observations identified some flaw in a process or product used in performing a government contract could file a *qui tam*

complaint after public reports of some failure of performance by the contractor, even if the employee had no direct and independent information about that failure. The Tenth Circuit's approach is flawed both as a matter of law and as a matter of fact in this case.

The "original source" requirement is jurisdictional. *See* 31 U.S.C. § 3730(e)(4)(A) ("[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [(as was conceded here)] . . . unless the action is brought by the Attorney General or . . . an original source of the infraction"). Courts therefore have an obligation to undertake a careful review of *qui tam* complaints to assure that the allegations in the complaint meet the original source requirements—"direct and independent knowledge of the information on which the allegations are based." The Tenth Circuit undertook no such review in this case.

Stone's Engineering Report related solely to purported design defects in a piping system that would be used to manufacture "pondcrete," and the Amended Complaint (filed by the United States and Stone) discussed that issue at ¶¶ 30-43. Those allegations, however, concern Rockwell's improper handling of pondcrete and resultant releases of hazardous materials, which had nothing to do with the design defects that were the subject of Stone's Engineering Report.

The Engineering Report could not have constituted "direct and independent knowledge of the information" on which the pondcrete allegations were based. At most, his information about Rockwell's disregard of his report might be the basis for an inference that the company was insufficiently attentive to the pondcrete issue. But "direct" knowledge cannot be based on such inferences. "Direct Evidence," rather, is "defined as "[e]vidence that is

based on personal knowledge or observation and that proves a fact without inference or presumption." *Black's Law Dictionary* 596 (8th ed. 2004). Stone's information was "circumstantial evidence," defined as "Evidence based on inference and not on personal knowledge or observation—also termed *indirect evidence*." *Id.* at 595 (emphasis in original). According to Wigmore,

> [T]he distinction between the two classes [of evidence] depends on whether the basis of inference is the assertion of a human being as to the existence of the thing in issue or the basis of the inference is any other fact: the one class is termed "testimonial," or "direct," evidence, the other "circumstantial," or "indirect" evidence.

1A Wigmore, *Evidence* § 24 (Tillers rev. 1983).

Moreover, as Rockwell demonstrated below, and the Tenth Circuit did not dispute, any inference that Stone drew from his Engineering Report was unfounded. *See* Pet'rs Reply to Brs. in Opp'n 6 ("Respondents never deny that the problem Stone predicted in his Engineering Report—a breakdown in the piping system—never occurred.").

Finally, Stone's other revelations—that he had been told not to discuss environmental issues with DOE and that he became aware that Rockwell's compensation under its contract was based in part on compliance with environmental and other safety statutes—do not give rise to any inferences of improper behavior by Rockwell.

As to the first, it is hardly surprising that a Government contractor would want to ensure proper managerial control over communications with the Government agency

that supervises the contract. This does not support an inference that the contractor did not report information to the Government, let alone that it made misrepresentations. As to the second, the terms of Rockwell's contract—which of course were known to the Government—at most provide a possible motive for Rockwell to fail to report environmental issues. But motives do not give rise to inferences of illegal behavior. Neither matter constitutes "direct and independent knowledge" of any fraud by Rockwell, let alone any knowledge of "actual environmental violations."

Even if Stone's information were "direct," his allegations were not "based upon" this information. The Amended Complaint never asserted that the pondcrete defects identified by Stone were the cause of the alleged release of hazardous materials. As detailed in Petitioners' brief, Stone and the Government did not argue to the jury that the environmental violations were caused by design defects. Instead, they argued that the violations were caused by human error.

Thus, under the Tenth Circuit's approach, an employee who claimed to identify a flaw in a process or product used in performing a government contract could file a *qui tam* complaint after public reports of some failure of performance by the contractor, even if the employee had no direct and independent information about that failure.

B. Without truly direct and independent knowledge of the facts on which the action is based, a relator is in no better position than is the Government—or the public to which it is accountable—to assess the costs and benefits of bringing suit. As Congress recognized, when a suit is based on public information, "the public will have at its disposal enough information to inquire of the

Government, in the event of inaction, why it failed to act and, if the answer is unsatisfactory, to enable the public to initiate corrective political action." Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 265 (1995).[2]

C. Under the rule created by the Tenth Circuit's decision, however, such suits will become more and more common—as will the costs that such suits impose. Liability under the Act depends on fact-bound determinations of "intent to defraud." Consequently, it may be difficult for defendants to obtain pretrial disposition—even in nonmeritorious cases. Defendants face intense pressure to settle even meritless cases, because the availability of treble damages means that "qui tam cases quickly can become 'bet the company' propositions." David T. Bradford, *Qui Tam Litigation: An In-House Perspective*, N97WCCB ABA Legal Ed. I-19, I-26 (1997).

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[2] The weakening of the public disclosure bar as a meaningful check on certain abusive *qui tam* suits is especially problematic because "unadopted *qui tam* cases almost invariably proceed under intense Justice Department and agency silence." John Chierichella & Louis Victorino, *A Qui Tam Conundrum: When Relator's Suit Lacks Merit, What is Government's Duty to the Contractor?*, Legal Times, Feb. 28, 2000, at 30. Though the Act permits the Government to move to dismiss *qui tam* suits over the relator's objection, *see* 37 U.S.C. § 3730(c)(2)(A), the Government rarely does so—even when it has declined to intervene in the suit. *See* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 Admin. L. Rev. 1345, 1347 n.3 (2000). Indeed, "[s]ince many *qui tam* actions allege damages in the millions and threaten significant statutory penalties, it would seem that the United States has a powerful monetary interest in not derailing such unadopted claims." Chierichella & Victorino, *supra*, at 30.

Taxpayers may ultimately bear many of these costs. Where the Government declines to intervene and the relator has not won a court judgment, federal regulations permit a contractor to recover up to 80 percent of its legal costs. *See* 48 C.F.R. §§ 31.205-47(c)(2), (e); *see also, e.g., Fluor Hanford, Inc. v. United States*, 66 Fed. Cl. 230, 232 (2005) (contractor reimbursed 80 percent of legal costs from defending *qui tam* suit). Even if the case is settled, the contractor can recover costs if "the allegations in the [*qui tam*] action had 'very little likelihood of success on the merits.'" *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1288-89 (Fed. Cir. 2002) (quoting 48 C.F.R. § 31.205-47(c)(2)). As a result, "the government frequently reimburses the defendant in an amount that substantially exceeds the [False Claims Act] penalties obtained by a relator who proceeds with a case." *See* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 226 (1998).

## II. THE TENTH CIRCUIT'S APPROACH WOULD ADVERSELY AFFECT THE GOVERNMENT'S PROCUREMENT OF MILITARY EQUIPMENT AND SERVICES.

In three specific circumstances, the Tenth Circuit's decision is likely to increase the number of *qui tam* suits that will tend to interfere with the efficient procurement of state-of-the-art equipment and services: (1) public disclosure of technical problems with technologically advanced and developmental military equipment, (2) public disclosure of alleged violations of complex procurement and accounting regulations, and (3) public disclosure of the results of a contractor's own internal investigation and voluntary disclosure to the Government of false claims.

### A. *Qui Tam* Suits Arising Out of Public Debate Over Advanced Military Equipment.

The Tenth Circuit's approach, combined with public disclosure of the inevitable failures of some advanced military equipment, increases the opportunity for abusive *qui tam* suits by relators who possess knowledge only tangentially related to the circumstances of the failures.

A "common procurement fraud case involves substandard products or services." John T. Boese, *The Science and Art of Defending a Civil False Claims Act Case Brought by a* Qui Tam *Relator*, N97WCCB ABA Legal Ed. I-1, I-1 (1997). Defense contractors are especially vulnerable to this type of suit:

- The Department of Defense's "new weapon system program systems are expected to be the most expensive and complex ever." U.S. Gov't Accountability Office, *DOD Acquisitions: Contracting for Better Outcomes* 4 (2006) ("*DOD Contracting*").

- Given the complexity of state-of-the art weapons systems, technical difficulties during the development process are inevitable. *See* Kovacic, *supra*, at 209 ("The risk-taking associated with R&D-intensive programs inevitably will yield costly failures.").

- Given the politically-charged environment in which the military often operates, some of these complications will be high profile. *See, e.g., United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 36 (D. Mass. 1995) (*qui tam* suit followed public "debate . . . about the effectiveness of defensive weaponry known as the Patriot Air Defense Missile System").

If a relator files a complaint after reading a newspaper account of test failures, for instance, the original source requirement may be the principal protection against a long, costly *qui tam* suit. Defense contractors have long depended on the public-disclosure bar—and a reasonable application of the original source exception—to avoid expensive trials of abusive qui tam suits. *See, e.g., Dingle v. BioPort Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (public-disclosure bar required dismissal of *qui tam* suit arising out of manufacture of anthrax vaccine for military use); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1150 (2d Cir. 1993) (relator not original source of allegations arising out of crash of Army Black Hawk helicopter).

Yet under the Tenth Circuit's expansive view of "original source," a *qui tam* suit could be brought by a relator with any "information" about the equipment at issue—even if not directly related to the facts that form the basis for the suit. A supervisor's rejection of an employee's proposed design for a new piece of equipment could become "original source" fodder for a *qui tam* suit based on entirely unrelated public information about which the relator had no direct knowledge. The original source rule reflects Congress' judgment that a *qui tam* suit in this circumstance is unlikely to serve the public interest.

In an analogous context, the Court has recognized that imposing undue liability upon federal defense contractors affects the cost and availability of military technology to the government: "The imposition of liability against Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its prices." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

This Court's concerns were borne out by a 1994 survey of defense contractors, commissioned by the U.S. Department of Defense, which found that "world class commercial-oriented firms are increasingly reluctant to participate in the defense market because of concerns that the DoD regulatory environment will raise their costs and expose them to unacceptable civil and criminal risks." *The DoD Regulatory Cost Premium: A Quantitative Assessment* 1 (1994) (report prepared for Secretary of Defense William J. Perry). Under the Tenth Circuit's approach, defense firms will have an additional incentive "to limit dealings with the government to the sale of mature products with stable designs." Kovacic, *supra*, at 235.

### B. *Qui Tam* Suits Based on Publicly Disclosed Disagreements About Technical Regulatory Matters.

The Tenth Circuit's decision also subjects defense contractors to counterproductive *qui tam* suits based on the public disclosure of disagreements between the contractor and the Government about alleged technical violations of complex regulations. Many such disagreements are normally worked out in the course of contract administration. Allowing *qui tam* relators to sue contractors on the basis of the public disclosure of such disputes, without requiring that the relator have direct and independent knowledge of the facts upon which his suit is based, disserves the cause of efficiency in government contracting. For *qui tam* relators are "less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc," given that they "are motivated primarily by prospects of monetary reward

rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).[3]

If such *qui tam* suits proceed, based on a broad exception to the public disclosure bar, "[t]he costs of contractors and DOD may increase as the parties resort more extensively to formal techniques for modifying regulatory or statutory restrictions." Kovacic, *supra*, at 234. Department of Defense contracts already "are far more complex and detailed than their commercial counterparts. The voluminous nature of these contracts compels program managers to devote considerable time to reviewing and analyzing contract provisions, and taking action to ensure full compliance with the range of contract requirements." *DOD Regulatory Costs*, *supra*, at 24. Such administrative burdens would be magnified if contractors faced the threat that unwarranted *qui tam* litigation might arise from the publication of any compliance misstep.

In sum, the Tenth Circuit has opened the door to *qui tam* suits based on public information about minor regulatory violations. When, in these circumstances, the Government loses its prosecutorial discretion, taxpayers

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[3] The cases illustrate the Government's reluctance to dismiss even those *qui tam* suits that undermine the Government's relationships with defense contractors. In *Hughes Aircraft*, the relator sued after an audit initially suggested overcharging by defendant. Although the Government declined to intervene, it also did not move to dismiss the action, 520 U.S. at 943 n.2—even after "[t]he Government ultimately reversed its preliminary determinations[ and] conclude[ed] that the [practice at issue] had actually benefited the Government." *Id.* at 943 n.1. In another case, the Government did not seek to dismiss a case involving a contract with the U.S. Navy, notwithstanding testimony on behalf of defendant from "the procuring officer with authority to sign and execute contracts on behalf of the Navy." *See United States ex rel. McCoy v. Seward Marine Servs., Inc.*, No. 91-1642, 1992 WL 182816, at *2-*3 (4th Cir. Aug. 3, 1992).

foot the bill: contractors' compliance costs "ultimately [are] absorbed by DoD in the form of increased unit costs for military equipment and services." *Id.* at 12.

### C. *Qui Tam* Suits Arising Out of Internal Investigations and Voluntary Disclosures

Ironically, by making it easier for relators to bring *qui tam* suits based on information in the public domain, the Tenth Circuit's formulation may also impede the detection or reporting of problems with equipment supplied to the Department of Defense.

1. Rigorous enforcement of the public disclosure bar—and faithful interpretation of the original source exception—discourages employees from sitting on suspicions or predictions about potential problems with the fulfillment of defense contracts. The public disclosure bar is "intended to spur relators into bringing information to the Government at the earliest possible instance so that the Government may take effective action." Salcido, *supra*, at 278.

But as Stone's conduct illustrates, defense contractors often face *qui tam* suits brought by employees who claim to have suspected fraud for years—but do not come forward with these suspicions until after they have been fired or laid off, or until they have allowed the potential bounty to accumulate over time. *See, e.g.*, *Wang v. FMC Corp.* 975 F.2d 1412, 1417 (9th Cir. 1992) (relator claimed to have been aware of the fraud in 1983 but "waited until December, 1987, a year after he was fired by [the defense contractor], to bring the alleged fraud to Government's attention"); *Fluor Hanford*, 66 Fed. Cl. at 231 (laid-off employee had initially filed a *qui tam* suit against a different company, but "amended his *qui tam* complaint to

add [his former employer] as a defendant following his dismissal").

Absent the Tenth Circuit's misinterpretation of the original source exception, the relator who sits on such suspicions does so at his peril. The longer he waits, the greater the risk that material information or allegations will become public and thus bar his suit. But in expanding the original source exception to cover cases in which the employee does not have direct and independent knowledge of the allegation upon which the suit is based, the Tenth Circuit approach may encourage employees to delay reporting their suspicions.

2. The Tenth Circuit's expansive interpretation also discourages contractors from involving their employees in internal investigations of potential problems. Because the Tenth Circuit conferred original source status on relators with information only tangential to the actual problem, the court has made it riskier for employers to disseminate information from which an employee could infer, indirectly, that fraud was afoot. By conducting an internal investigation into potential problems with the fulfillment of defense contracts, then, conscientious "contractors may unwittingly cultivate a number of potential 'original source' qui tam plaintiffs by exposing them to fraud allegations and using their factual contributions" to paint a more complete picture. Robert S. Ryland, *The Government Contractor's Dilemma: Voluntary Disclosures as the Source of Qui Tam Litigation*, 22 Pub. Cont. L.J. 764, 810 (1993).

3. An expansive interpretation of the original source exception further undermines the Defense Department's efforts to encourage voluntary disclosure of problems with military contracts. In 1986, the Department of Defense established a voluntary

compliance program that "encourages Defense contractors to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters affecting their corporate contractual relationships with DoD." Inspector General, Dep't of Defense, *The Department of Defense Voluntary Disclosure Program* 1 (1990) ("*DOD Voluntary Disclosure*"). To encourage voluntary disclosures, the Pentagon "will consider such cooperation as an important factor in any decisions that the Department takes in the matter." Letter from William H. Taft IV, Deputy Secretary of Defense 1 (July 24, 1986), *reprinted in DOD Voluntary Disclosure*, *supra*, at app. 1.

Unfortunately,

> many contractors believe that the goals of the self-governance programs to increase voluntary disclosures and reduce reliance on adversarial proceedings have not been fulfilled because participations in self-governance initiatives that were designed to avoid litigation may offer no protection against and may even become the source of qui tam litigation.

Ryland, *supra*, at 765. This concern arises largely "from unresolved ambiguities in False Claims Act jurisdiction for actions brought by purported 'original sources' of fraud allegations." *Id.*

Indeed, the Tenth Circuit's expansive original source exception may imperil contractors that disclose problems voluntarily. For instance, in one case, a relator "base[d] his claims on [the defense contractor's] own self-critical assessment of its work after the project was ended by the Army," and the "memorandum relied on by [the relator] was part of a dialogue with the Army." *Wang*, 975 F.2d at

1421. Even if such information were part of the public record after the firm had voluntarily disclosed it to the Government, the Tenth Circuit's interpretation of the original source exception would allow a relator's suit to proceed based on more limited, indirect information that predated the disclosure.

## CONCLUSION

For the preceding reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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OCTOBER 2006

No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., *ET AL.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *ET AL.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR TAXPAYERS AGAINST FRAUD EDUCATION FUND AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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November 20, 2006

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iv

INTEREST OF *AMICI CURIAE* ..... 1

STATEMENT ..... 1

A. The 1863 Statute Permitted Parasitic Claims Based Only On Public Information ..... 2

B. The 1943 Amendment Imposed A "Government Information Bar" That Precluded Valid Suits By Relators Who Provided Original Information To The Government ..... 3

C. The 1986 Amendment Allows Suits Based On A Public Disclosure, As Long As The Relator Is An "Original Source" ..... 5

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 8

I. JURISDICTION PURSUANT TO 31 U.S.C. § 3730(e)(4)(A) DEPENDS ON "THE STATE OF THINGS" WHEN THE ACTION IS BROUGHT ..... 8

A. The General Rule That Jurisdiction Is Determined When Suit Is Filed Applies To § 3730(e)(4)(A) Original Source Determinations ..... 8

B. Petitioners' Contention That Jurisdictional Requirements For Original Source Status Must Be Maintained Throughout The Litigation Has No Merit ..... 9

II. JURISDICTION EXISTS WITHIN THE PLAIN MEANING OF 31 U.S.C. § 3730(e)(4) BECAUSE THIS SUIT WAS BROUGHT BY AN "ORIGINAL SOURCE" ..... 10

A. Not Every Relator Is Required To Be An "Original Source" ..... 10

B. To Be An Original Source, A Relator Must Have Direct And Independent Knowledge Of Information That Supports The Essential Allegations In His Complaint, And Provide That Information To The Government Prior To Filing Suit Without Being Compelled To Do So ..... 11

1. The "information on which the allegations are based" is information that can be used to prove allegations entitling the relator to relief ..... 12

2. "Direct and independent knowledge" means knowledge obtained from one's own efforts apart from the public disclosure ..... 16

3. Information is "voluntarily provided" when it is given in the absence of compulsory process ..... 19

C. The "Original Source" Provision Should Not Be Construed To Incorporate Concepts Already Present In The Federal Rules Of Civil Procedure ..... 21

III. THE HISTORY OF THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT CONFIRMS THE STATUTE'S PLAIN MEANING ..... 23

A. The Public Disclosure Bar Was Congress's Solution To The Restrictions On *Qui Tam* Suits Imposed By The 1943 Amendment ..... 24

B. The Parasitic Suits That Congress Intended To Foreclose Are Those In Which The Relator's Essential Allegations Of Fraud Are Supported Only By A Public Disclosure ..... 26

IV. A RESTRICTIVE READING OF THE "ORIGINAL SOURCE" EXCEPTION WILL LEAVE A RANGE OF FRAUDS UNDISCOVERED ..... 28

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

Page

CASES

*Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235 (2006) ..... 8

*BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002) ..... 15

*Comstock Resources, Inc. v. Kennard*, 125 S. Ct. 2957 (2005) ..... 13

*Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) ..... 8, 9

*FDIC v. Four Star Holding Co.*, 178 F.3d 97 (2d Cir. 1999) ..... 10

*Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) ..... 20

*Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957) ..... 9

*Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991) ..... 10

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*Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978) ..... 3, 4

*Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) ..... 11

*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) ..... 13, 15

*Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000) ..... 15

*United States v. Emergency Med. Assocs. of Illinois, Inc.*, 436 F.3d 726 (7th Cir. 2006) ..... 10

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*United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993) ..... 12

*United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699 (8th Cir. 1995) ..... 19

*United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010 (E.D. Va. 1995) ..... 22

*United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) ..... 16

*United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group, Inc.*, 332 F. Supp. 2d 1 (D.D.C. 2003) ..... 20

*United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997) ..... 16, 17

*United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995) ..... 19

*United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) ..... 12, 13

*United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) ..... 19, 29

*United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351 (D. Mass. 1988) ..... 2, 3, 4, 23, 25, 26, 27

*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) ..... 3, 27

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*United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032 (8th Cir. 2002)..... 2, 3, 4, 5, 16

*United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) ..... 12, 16

*United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) ..... 19, 20

*United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320 (1st Cir. 1994) ..... 2, 3, 4, 5, 23, 27

*United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913 (D.C. Cir. 1999) ..... 11

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*Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005)..... 11

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STATUTES AND RULES

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ..... 1, 2, 5, 23

§ 4, 12 Stat. 698 ..... 2

§ 6, 12 Stat. 698 ..... 2

Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 ..... 4, 9

§ 1, 57 Stat. 609 ..... 4, 9

False Claims Act, 31 U.S.C. §§ 3729-3731 ..... *passim*

31 U.S.C. § 3730 ..... 14

31 U.S.C. § 3730(d)(1) ..... 14, 15

31 U.S.C. § 3730(e)(4) ..... 10, 22

31 U.S.C. § 3730(e)(4)(A) ..... 5, 6, 8, 9, 10, 11, 12, 22, 23

31 U.S.C. § 3730(e)(4)(B) ..... 6, 7, 11, 12, 13, 14, 15, 16, 18, 21, 22, 23

31 U.S.C. § 3730(h) ..... 24

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* ..... 8, 15

28 U.S.C. § 1603(b)(2) ..... 8

28 U.S.C. § 1605(a)(2) ..... 15

Rev. Stat. §§ 3490-3494 (1878) ..... 1

Rev. Stat. § 5438 (1878) ..... 1

12 U.S.C. § 1819 ..... 10

28 U.S.C. § 1441(d) ..... 8

Fed. R. Civ. P.:

Rule 8 ..... 22

Rule 8(a)(2) ..... 21

Rule 9 ..... 22

Rule 9(b) ..... 22

Rule 11 ..... 22

Rule 11(b)(3) ..... 22

Sup. Ct. Rule 37.6 ..... 1

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## INTEREST OF *AMICI CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as an *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country composed of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of more than 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

## STATEMENT

Congress enacted the False Claims Act ("FCA") in 1863 at President Lincoln's request to combat rampant fraud in procurement during the Civil War.[2] It has since been

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

[2] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"), *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States ex rel.*

twice amended, once in 1943 and again in 1986. The historical background to the 1943 and 1986 amendments to the FCA is important to place the statutory construction issue in this case in its proper context.

### A. The 1863 Statute Permitted Parasitic Claims Based Only On Public Information

As originally enacted, the FCA allowed any person to bring suit alleging that another had defrauded the Government. *See* 1863 Act § 4, 12 Stat. 698 ("[s]uch suit may be brought and carried on by any person, as well for himself as for the United States"). Although the relator had to bear all costs of the litigation, *see id.*, success reaped the relator one-half of the total proceeds recovered and collected, *see id.* § 6, 12 Stat. 698. *See also United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

Federal courts entertained few *qui tam* suits after the enactment of the FCA, but saw a marked increase in the 1930s and 1940s with the rise of government contracts stemming from the New Deal and World War II. *See United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1041 (8th Cir. 2002); *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 324 (1st Cir. 1994); *Springfield*, 14 F.3d at 649. The 1863 Act "permitted a private relator to initiate suit even though that private individual contributed nothing to the exposure of the fraud alleged." *Williams*, 931 F.2d at 1497; *see S. Prawer & Co.*, 24 F.3d at 324; *Springfield*, 14 F.3d at 649. Relators took advantage of that statutory permissiveness, often bringing "parasitical" claims in which "the relator sued upon information copied from government files and indictments."

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*Williams v. NEC Corp.*, 931 F.2d 1493, 1496-97 (11th Cir. 1991) (recounting FCA history); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354 (D. Mass. 1988) (same); H.R. Rep. No. 99-660, at 17 (1986); S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

*Williams*, 931 F.2d at 1497; *see Minnesota Ass'n*, 276 F.3d at 1041; *LaValley*, 707 F. Supp. at 1354.

This Court took up the Government's challenge to such "parasitic" claims in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The Government claimed that Marcus "received his information not by his own investigation, but from [a] previous indictment." *Id.* at 545. Interpreting the statute consistent with its plain meaning, the Court rejected the Government's contentions that a relator should have to sue based on his own information and that the statute's plain meaning inappropriately encouraged "unseemly races for the opportunity of profiting from the government's investigations." *Id.* at 546-47. Nothing in the FCA as enacted in 1863 prevented such parasitic suits, this Court concluded.

### B. The 1943 Amendment Imposed A "Government Information Bar" That Precluded Valid Suits By Relators Who Provided Original Information To The Government

"*Hess* inspired public outcry over the liberality of the *qui tam* provisions that prompted speedy congressional response." *Springfield*, 14 F.3d at 650; *see S. Prawer & Co.*, 24 F.3d at 325. In direct response to *Hess*, Congress amended the FCA in 1943 to eliminate "parasitical" suits. *See Minnesota Ass'n*, 276 F.3d at 1041; *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978) (citing *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949); *United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945)). "[T]he House bill would have repealed the *qui tam* provisions altogether, while the Senate bill barred *qui tam* jurisdiction for suits based on information already in possession of the government unless the information was 'original with such person.'" *Springfield*, 14 F.3d at 650 (citing 89 Cong. Rec. 10,744 (1943)).

In the conference to resolve differences between the House and Senate versions, the Senate's "original source" provision was dropped without explanation and replaced

with the "government information bar." *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991); *Pettis*, 557 F.2d at 671; *LaValley*, 707 F. Supp. at 1354-55. As a result, the 1943 statute contained a broad jurisdictional bar against *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 ("1943 Act"); *see LaValley*, 707 F. Supp. at 1354-55 & n.3. In the decades that followed, "courts strictly construed the jurisdictional bar established in the 1943 amendments." *S. Prawer & Co.*, 24 F.3d at 325.

That strict construction reached its "nadir" when the Seventh Circuit decided *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). *See S. Prawer & Co.*, 24 F.3d at 325; *Springfield*, 14 F.3d at 650. In *Dean*, the court of appeals considered whether the State of Wisconsin could maintain its *qui tam* suit based on information it was required to submit to the Federal Government regarding Alice Dean, a medical doctor convicted "in state court of making fraudulent claims for Medicaid reimbursements." 729 F.2d at 1102. It was undisputed that (1) the State had conducted the fraud investigation; (2) the State was an original source of the information; and (3) the Federal Government required the State to report the fraud" to the Federal Government. *See id.* at 1102-03. Nevertheless, because the government-information bar precluded *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States," 1943 Act § 1, 57 Stat. 609, the Seventh Circuit in *Dean* concluded that Wisconsin's *qui tam* suit was barred. *See* 729 F.2d at 1106-07; *see also Minnesota Ass'n*, 276 F.3d at 1041; *S. Prawer & Co.*, 24 F.3d at 325-26.

The Seventh Circuit concluded that, if Wisconsin wanted an exemption to the FCA due to its requirement that the State report Medicaid fraud to the Federal

Government, "then it should ask Congress to provide the exemption." *Dean*, 729 F.2d at 1106; *see Springfield*, 14 F.3d at 650. The National Association of Attorneys General did just that in the wake of *Dean*, adopting a resolution calling on Congress to rectify "the unfortunate result" of the *Dean* decision. S. Rep. No. 99-345, at 13, 1986 U.S.C.C.A.N. 5278.

### C. The 1986 Amendment Allows Suits Based On A Public Disclosure, As Long As The Relator Is An "Original Source"

Against that background, Congress amended the FCA in 1986 "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1, 1986 U.S.C.C.A.N. 5266; *see S. Prawer & Co.*, 24 F.3d at 326. The 1986 amendment sought to achieve a middle ground between the over-permissiveness of the 1863 Act, which allowed "parasitic" claims based purely on the public disclosures, and the over-restrictiveness of the 1943 amendment, which denied recovery to relators even when they independently discovered, investigated, and reported fraud to the Government. *See Minnesota Ass'n*, 276 F.3d at 1040-41 ("The 1986 amendments were an avowed attempt to reinvigorate the [FCA] after [the] 1943 amendment and judicial decisions interpreting the 1943 amendment had emasculated the 1863 law.").

Congress's solution was the "public disclosure bar." Rather than preclude suits based on information in the Government's possession, Congress erected a jurisdictional bar against suits based on a "public disclosure of allegations or transactions." 31 U.S.C. § 3730(e)(4)(A). As amended in 1986, the FCA provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media." *Id.* Congress further enacted two

exceptions to that jurisdictional bar. A court may exercise jurisdiction over a suit "based upon the public disclosure of allegations" when "the action is brought by the Attorney General or the person bringing the action is an original source of the information." *Id.*

An "original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B). This case concerns the meaning of the "original source" exception to the "public disclosure bar."

## SUMMARY OF ARGUMENT

The "public disclosure bar" of the False Claims Act ("FCA") precludes jurisdiction over certain *qui tam* actions that are based on the public disclosure of fraud allegations or fraudulent transactions. *See* 31 U.S.C. § 3730(e)(4)(A). A court has jurisdiction over such a suit only if it is brought by the Attorney General or an "original source" relator. Jurisdiction exists over the present suit because the relator, Stone, is an original source of the information on which the allegations in his *qui tam* complaint were based.

An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B). By that plain language, the relator must voluntarily provide the Government with information about the allegations that form the basis of the complaint prior to filing an FCA *qui tam* action, and the relator must have obtained knowledge of this information through his own efforts and not through the public disclosure. Information is "voluntarily provided" when given to the Government without compulsory process.

That interpretation of "original source" follows from the plain meaning of § 3730(e)(4)(B), which speaks in unambiguous terms. It is "entirely in accord with the Act's legislative history," *Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006), and it is consistent with the statutory history of the FCA, which has twice been amended since its enactment in 1863, both times in response to judicial decisions deemed to be inconsistent with Congress's policy objectives. The "original source" exception seeks to prevent parasitic suits by opportunistic late-comers based purely upon public disclosures of information while preserving actions brought by relators who provide original information about false claims to the Government. Reading § 3730(e)(4)(B) any more restrictively will deter genuine relators from coming forward, perpetuating a range of undiscovered frauds.

The Tenth Circuit's decision below is entirely consistent with that understanding of the "original source" exception. The relator, Stone, "learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste," and he made his concerns known to Rockwell, which told him to keep quiet. Pet. App. 21a. He used that information as the basis for the allegations of fraud in his complaint. As a result, Stone had direct and independent knowledge of information underlying the fraud allegations in his complaint. Moreover, he voluntarily provided that information to the Government prior to filing suit. He did not derive his information from the public disclosure. Because that is all the statute requires, the judgment below should be affirmed.

## ARGUMENT

### I. JURISDICTION PURSUANT TO 31 U.S.C. § 3730(e)(4)(A) DEPENDS ON "THE STATE OF THINGS" WHEN THE ACTION IS BROUGHT

#### A. The General Rule That Jurisdiction Is Determined When Suit Is Filed Applies To § 3730(e)(4)(A) Original Source Determinations

When "the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006) (footnote omitted). Section 3730(e)(4)(A) limits the "jurisdiction" of courts entertaining suits under the FCA. As relevant here, a court has jurisdiction over a suit "based upon the public disclosure of allegations or transactions" when "the person bringing the action *is* an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). The statute thereby "confer[s] subject-matter jurisdiction only for actions brought by specific plaintiffs." *Arbaugh*, 126 S. Ct. at 1245 n.11.

Because § 3730(e)(4)(A) "is expressed in the present tense," the "plain text of this provision . . . requires that [jurisdictional] status be determined at the time suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). In *Dole*, the defendant claimed to be an "instrumentality" of the State of Israel within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), and therefore entitled to remove suits against it pursuant to 28 U.S.C. § 1441(d). This Court concluded that "the plain text of [§ 1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478. Likewise, because § 3730(e)(4)(A) is "expressed in the present tense," Stone's status as an "original source" must "be determined at the time suit is filed." *Id.*

Focusing the jurisdictional inquiry on a relator's status at the time he files suit is consistent with the history of the FCA. The current version of the Act resulted from a 1986 amendment to the 1943 Act, which precluded jurisdiction when "it shall be made to appear" that the "suit was based upon evidence or information" in the Government's possession "*at the time such suit was brought.*" § 1, 57 Stat. 609 (emphasis added). Although that language does not appear in the 1986 amendment, this Court does not "presume that the revision worked a change in the underlying substantive law 'unless an intent to make such a change is clearly expressed.'" *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)) (alterations omitted). Given that Congress employed the present tense and gave no indication that it was changing the relevant "time" for making the jurisdictional determination when it amended the FCA in 1986, the "time-of-filing" rule from the 1943 Act therefore is the most logical way to construe § 3730(e)(4)(A). *Id.* at 208.

Determining a relator's status at the time he files suit also is consistent with the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.* at 207 (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (same); *Dole*, 538 U.S. at 478. Thus, in a *qui tam* suit, whether "the person bringing the action is an original source" depends only on "the state of things at the time of the action brought," not the state of things at trial or post-verdict.

### B. Petitioners' Contention That Jurisdictional Requirements For Original Source Status Must Be Maintained Throughout The Litigation Has No Merit

Petitioners argue that, because § 3730(e)(4)(A) is jurisdictional, "the requirements of the original source exception must be satisfied at all stages of the litigation." Pet.

Br. 28-29. But that assertion is inconsistent with the plain meaning and history of § 3730(e)(4)(A) and the centuries-old principle that jurisdiction is based on "the state of things at the time of the action brought." *Mollan*, 22 U.S. (9 Wheat.) at 539. Moreover, this Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam). The Court has applied that principle in a variety of contexts, holding, for example, that a change in a party's citizenship while a suit is pending does not divest a court of diversity jurisdiction. *See, e.g., id.*; *Wichita R.R. & Light Co. v. Public Util. Comm'n of Kansas*, 260 U.S. 48, 54 (1922). There is no reason to view use of the term "jurisdiction" in § 3730(e)(4)(A) any differently. Such "jurisdiction," if established at the initiation of the suit, cannot be divested by events during discovery, at trial, or post-verdict, as petitioners erroneously contend (Pet. Br. 27-30). *Compare FDIC v. Four Star Holding Co.*, 178 F.3d 97, 101 (2d Cir. 1999) ("hold[ing] that the transfer of assets by FDIC to a private third party does not divest the court of subject matter jurisdiction under [12 U.S.C. §] 1819," even though jurisdiction under § 1819 requires the FDIC to be a party).

## II. JURISDICTION EXISTS WITHIN THE PLAIN MEANING OF 31 U.S.C. § 3730(e)(4) BECAUSE THIS SUIT WAS BROUGHT BY AN "ORIGINAL SOURCE"

### A. Not Every Relator Is Required To Be An "Original Source"

Not every *qui tam* suit presents the question whether the relator is an "original source." That question arises only when a relator's suit under the FCA is "based upon the public disclosure of allegations or transactions." 31 U.S.C. § 3730(e)(4)(A). A court must therefore evaluate two predicate questions before the "original source" issue even arises. *See, e.g., United States v. Emergency Med. Assocs. of Illinois, Inc.*, 436 F.3d 726, 728 (7th Cir. 2006);

*Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 974 (6th Cir. 2005); *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 915-16 (D.C. Cir. 1999).

The first is whether there has been a "public disclosure of allegations or transactions." If no public disclosure has occurred, then § 3730(e)(4)(A) presents no impediment to the court's jurisdiction. If there *has* been a "public disclosure," then a court must determine whether the *qui tam* action is "based upon" that public disclosure. Only if the relator's action is "based upon" the public disclosure must he be an "original source."

This case comes to the Court having had both predicate questions answered affirmatively. The parties agree that Stone's suit is "based upon" a "public disclosure." The question for this Court therefore is whether Stone is an "original source" within the meaning of § 3730(e)(4)(B).

### B. To Be An Original Source, A Relator Must Have Direct And Independent Knowledge Of Information That Supports The Essential Allegations In His Complaint, And Provide That Information To The Government Prior To Filing Suit Without Being Compelled To Do So

The core of the "original source" exception to the public-disclosure bar is the relator's information about the defendant's false claims to the Government. At the time the relator files suit, the relator's allegations must be "based on" that information; the relator must have "direct and independent knowledge" of that information; and the relator must already have "voluntarily provided" that information to the Government. 31 U.S.C. § 3730(e)(4)(B). Determining when a relator is an "original source" turns on the plain meaning of each of those statutory requirements. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *see also Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("[W]ords in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)).

### 1. The "information on which the allegations are based" is information that can be used to prove allegations entitling the relator to relief

**a.** Because jurisdiction pursuant to § 3730(e)(4)(A) must be determined at the time the suit was brought, *see supra* Part I, the relevant "allegations" for purposes of § 3730(e)(4)(B) are those in the relator's complaint.[3] An "allegation," in turn, is a "formal statement of a factual matter as being true or provable, *without its having yet been proved*." *Black's Law Dictionary* 81 (8th ed. 2004) (emphasis added).[4]

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[3] *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) ("To establish original source status knowledge, a *qui tam* plaintiff must allege specific facts . . . showing exactly how and when he or she obtained direct and independent knowledge of the *fraudulent acts alleged in the complaint* and support those allegations with competent proof.") (second emphasis added); *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999) (Alito, J.) (finding that the relator was not the "original source" because he did not have "direct and independent knowledge" of the most critical element of the claims brought in his *qui tam* complaint); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1993) (holding that an employee of a government subcontractor had "direct and independent knowledge" of the allegations contained in his *qui tam* complaint).

[4] *Amici* BP America Production Company *et al.* ("BP") therefore are mistaken when they argue that an "original source" must have "knowledge concerning 'allegations' that were publicly disclosed." *Amici* BP Br. 7. Such a requirement is inconsistent not only with the jurisdictional nature of the "original source" provision, but also with the plain meaning of the statute. An "original source" must have "knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). If BP is correct, then Congress intended for "the allegations" in that definition to refer to the allegations publicly disclosed. But, without knowing on what information the publicly disclosed allegations were based, a court has no way of knowing whether the relator's information was the basis for those allegations. A court can only know whether a potential relator has "direct and independent knowledge of the information on which the allegations" in the relator's complaint "are based." *Id.*

*Amici* BP seek to disqualify relator Harrold E. Wright from being able to bring a large and complex FCA *qui tam* action against major oil companies for underpaying royalties on natural gas, natural gas

The allegations in a relator's complaint form the basis for the cause of action under the FCA. An "action" is "based" on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). The relevant allegations for purposes of § 3730(e)(4)(B), therefore, are those allegations "that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* For the relator to be an "original source," those essential allegations in his complaint must be "based on" information about which the relator has "direct and independent knowledge."

The information itself need not *prove* those allegations, but rather must support the truth or probability of allegations in the relator's complaint so "that, if proven," the relator will be entitled to relief "under his theory of the case," *Id.*; *see* Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 Liberty U. L. Rev. (forthcoming Dec. 2006), *available at* http://www.liberty.edu/LawReviewHesch ("Hesch manuscript").

The Tenth Circuit correctly concluded that "the phrase 'information on which the allegations are based' means 'the information *underlying or supporting* the fraud allegations contained in the plaintiff's *qui tam* complaint.'" Pet. App. 20a-21a (quoting *Hafter*, 190 F.3d at 1162). The court below also properly drew "a distinction between the actual act of fraud, *i.e.*, the actual submission of inaccu-

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liquids, and condensate. *See United States ex rel. Wright, et al. v. AGIP Petroleum Co., et al.*, No. 5:03-CV-264-DF (E.D. Tex.). The district court in that case has properly rejected the oil companies' efforts to defeat Wright as an "original source." *Last year*, this Court properly denied certiorari in a case arising out of the Tenth Circuit involving Wright's status as an original source. *See Comstock Resources, Inc. v. Kennard*, 125 S. Ct. 2957 (2005). Petitioners here – though not *amici* BP – concede that, even under their proposed test, Wright qualifies as an original source. *See* Reply to Briefs in Opp. at 1 n.1 (filed July 25, 2006) ("The relator in *Comstock* actually knew about the fraud itself – he held oil leases upon which Comstock was making inadequate payments.").

rate claims by Rockwell to [the Department of Energy], and the facts underlying or which give rise to the fraud, *i.e.*, the environmental, health and safety violations themselves." *Id.* at 21a. Stone readily satisfies that interpretation of § 3730(e)(4)(B). As the Tenth Circuit concluded, "Stone's knowledge that a defective pondcrete manufacturing process would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information 'underlying or supporting' his allegation concerning Rockwell's alleged ultimate fraudulent activity." *Id.*

By contrast, petitioners' interpretation of "information" is inconsistent with the plain meaning of the statute. It is one thing to require an "original source" to have knowledge of information that gives rise to essential allegations of fraud. It is quite another to require an "original source" to have knowledge of the actual fraud itself, as petitioners urge. *See* Pet. Br. 31 (arguing that an "original source" must have "firsthand knowledge of the actual fraud"). This anti-textual reading of the statute is contrary to the plain meaning of the statute and is far more restrictive than Congress ever intended. *See infra* Part III.

**b.** Petitioners' interpretation also is inconsistent with the structure of § 3730, which indicates that Congress did not expect all "original source" relators to have the same amount of information when they file suit. *See generally* Hesch manuscript at 31-34 (explaining the significance of the FCA's "graduated knowledge" structure). Section § 3730(d)(1) provides "a descending scale of recovery ranges that are proportional to the public service provided by the relators." *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 105 (3d Cir. 2000) (Alito, J.). The highest range (15 to 25 percent) is for relators whose action is not "based primarily on" public disclosures and for most relators who qualify as "original sources." 31 U.S.C. § 3730(d)(1); *see Merena*, 205 F.3d at 105. A relator's recovery within this range depends "upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1).

An "original source" relator whose action is "based primarily on" public disclosures, by contrast, can receive at most 10 percent of the proceeds, and his recovery depends on "the significance of the information and [his] role . . . in advancing the case to litigation." *Id.* Thus, one relator might bring an action that is "based upon" but not "based *primarily* on" publicly disclosed information; another relator might bring an action "based primarily on" publicly disclosed information that he provided; and still another relator might bring an action that is "based primarily on" publicly disclosed information that he did not provide. Each of these relators could be an "original source." *See Merena*, 205 F.3d at 105.

Congress therefore provided that "original source" relators can have varying levels of information apart from that which is publicly disclosed – and receive substantially different relator's awards as a result. In so legislating, Congress did not create a single standard – such as "knowledge of the actual fraud" – that a relator must meet to qualify as an "original source." Rather, by referring to "information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), Congress merely required an "original source" to have information that gives rise to allegations that, if proven, would entitle him to relief under his theory of the case.[5]

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[5] Of similar meaning is the requirement in the FSIA that the plaintiff's suit be "based upon," for example, a "commercial activity," 28 U.S.C. § 1605(a)(2), which this Court in *Nelson* interpreted as referring to "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," 507 U.S. at 357. Courts have not interpreted that language as requiring plaintiffs to be able to prove every element of their claim. *See, e.g., Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005) ("[S]o long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies, regardless of whether the plaintiff has either alleged or provided sufficient evidence of the additional facts necessary to prevail on the merits."); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir. 2002) ("[O]nly one element of a plaintiff's claim must concern commercial activity carried on in the United States."); *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)

### 2. "Direct and independent knowledge" means knowledge obtained from one's own efforts apart from the public disclosure

An "original source" will have two bases for the allegations – the information from the public disclosure and the information about which he has "direct and independent knowledge." 31 U.S.C. § 3730(e)(4)(B). The requirements that an "original source" relator's knowledge be "direct and independent" therefore distinguish between information "original" to the relator and information that is dependent on the public disclosure. *See Walters*, 519 U.S. at 209 ("Statutes must be interpreted, if possible, to give each word some operative effect."). Although the language used by the courts of appeals varies, most agree about the substance of the "direct" and "independent" requirements.

**a.** A relator has "direct" knowledge of the information on which he bases his allegations when he learns the information through his own efforts, not the efforts of others.[6] That usage is consistent with the plain meaning of "direct." *See Webster's Third New International Dictionary* 640 (2002) (defining "direct" as "transmitted back and forth without an intermediary").

A relator has "independent" knowledge of the relevant information when his knowledge is not obtained through the public disclosure.[7] That understanding likewise

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("The entire case need not be based on the commercial activity of the defendant.").

[6] *See, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 941 (6th Cir. 1997) ("'marked by absence of intervening agency'") (quoting *Stinson*, 944 F.2d at 1160); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("first-hand knowledge"); *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) ("through their own labor unmediated by anything else"); *see also* Hesch manuscript at 19 ("Virtually all courts treat 'direct' as meaning 'firsthand' knowledge, which some interpret as something the relator sees with his own eyes.").

[7] *See, e.g., Minnesota Ass'n*, 276 F.3d at 1048-49 ("knowledge not derived from the public disclosure"); *Mistick PBT*, 186 F.3d at 389 (Alito,

comports with the plain meaning of the statute. *See id.* at 1148 (defining "independent" as "not requiring or relying on something else"). Taken together, a relator has "direct and independent knowledge" when the knowledge is obtained through his own efforts and not through the public disclosure.

**b.** Ultimately, petitioners do not disagree with that interpretation of "direct and independent knowledge." *See* Pet. Br. 30. But they do disagree that Stone had "direct and independent knowledge" in this case. Petitioners argue that Stone's "knowledge" was nothing more than "highly inferential predictions of future events." *Id.* at 31. That assertion, however, flows not from petitioners' interpretation of "direct and independent," but rather from their interpretation of "information." Petitioners believe Stone's knowledge improperly related to "future events" and that, because Stone was not employed at Rockwell when the "actual fraud" occurred, he cannot be an "original source."

But nothing in the meaning of "information" supports petitioners' erroneous view that an "original source" must have "firsthand knowledge of the actual fraud." *Id.* And, in this case, Stone was at Rockwell when events occurred at Rocky Flats that gave rise to the allegations of fraud in his *qui tam* complaint. *See* Pet. App. 17a-18a, 20a-21a. His allegations were based on first-hand observations he made at Rocky Flats, apart from any public disclosure of allegations. *Id.* at 21a.[8] He therefore had "direct

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J.) ("'learned of the information absent public disclosure'") (quoting *Stinson*, 944 F.2d at 1160); *McKenzie*, 123 F.3d at 941 ("not dependent on public disclosure") (internal quotation marks omitted); *Findley*, 105 F.3d at 690 ("cannot depend or rely on the public disclosures"); *see also* Hesch manuscript at 21 ("The best definition of 'independent' is knowledge not derived from or dependent upon the public disclosure itself.").

[8] In particular, the "gravamen of Stone's claim is that he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent

and independent knowledge" of the information on which he based the allegations in his complaint. 31 U.S.C. § 3730(e)(4)(B).

**c.** Petitioners also claim that § 3730(e)(4)(B) contains an additional, implicit requirement that governs "*how much* direct and independent knowledge the relator must possess." Pet. Br. 32. They claim their view is "the interpretation most faithful to the text," *id.*, but in fact their reading of § 3730(e)(4)(B) is not faithful to the statute's text at all.

A relator's knowledge of information is sufficient when he has direct and independent knowledge of enough information to support allegations of fraud that, if proven, would entitle him to relief. *See supra* p. 13. If the information known by the relator gives rise to allegations that would *not* entitle him to relief, or if the relator's allegations *would* entitle him to relief, if proven, but those allegations do not derive from the relator's "direct and independent knowledge," then the relator is not an "original source." The plain language of § 3730(e)(4)(B) supports that understanding, and there is no need for this Court to resort to the judicially created test proposed by petitioners.[9]

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knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete." Pet. App. 21a.

[9] *Amici* BP similarly misread the statute. They argue that "[o]ne can not possibly have 'direct and independent knowledge' of the lawsuit's 'allegations' against the defendant unless he has *some* firsthand knowledge of the facts relating to the dealings between the defendant and the government that is the subject of the suit." *Amici* BP Br. 8. But the statute does not require knowledge of the allegations; it requires knowledge of the information underlying the allegations. The statute therefore does not require firsthand knowledge of the actual dealings between the defendant and the Government.

In the oil context, such a requirement would be completely absurd, because one division or office of an oil company typically reports and pays royalties to the Government based on information transmitted by completely different persons who monitor oil or gas well information. Under the oil companies' view, no person who had firsthand informa-

### 3. Information is "voluntarily provided" when it is given in the absence of compulsory process

**a.** The phrase "voluntarily provided" plainly means that the relator must give his information to the Government "without coercion." *Black's Law Dictionary* at 1605 ("voluntarily"). Coercion, in turn, can take many different forms. *See Webster's Third New International Dictionary* at 2564 (defining "voluntary" to mean "acting or done of one's own free will without valuable consideration; acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs"). The FCA signals no preference, and the federal courts have not settled on a single meaning. *See, e.g., United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 340 (3d Cir. 2005) (Government "initiated contact with a subpoena demanding information fundamental to the putative relator's action"); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc) (not voluntary because "compelled . . . by the very terms of his employment"); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 704 (8th Cir. 1995) (not "voluntary" when "discussion was initiated by" government agent); *United States ex rel. Stone v. AmWest Sav. Ass'n*, 999 F. Supp. 852, 857 (N.D. Tex. 1997) ("uncompensated," "unsolicited," or not "uncompelled") (internal quotation marks omitted). It is therefore unclear from the statute what type of coercion Congress had in mind to negate a relator's voluntary action.

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tion of fraudulent activities in underreporting gas volumes or values could ever be an original source because that person did not have access to or knowledge of the highly confidential royalty reports by the companies to the Minerals Management Service of the Department of the Interior. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 919 (4th Cir. 2003) ("[W]e decline to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement. If we established such a rule, corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability.").

The legislative history of the FCA, however, does speak directly to Congress's intent in the phrase "voluntarily provided." *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985) (consulting legislative history when "statute [is] ambiguous on its face"). The "voluntarily provided" requirement sought to exclude an individual who is "a source of the allegations only because the individual was subp[oe]naed to come forward." 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). It was not intended to exclude "those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure." *Id.*; *see* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the* Qui Tam *Door*, 27 Pub. Cont. L.J. 669, 715 (1998) ("Congress designed the provision merely to prevent those who were subpoenaed from qualifying as relators."). Many federal courts have found that legislative history persuasive in construing the meaning of "voluntarily."[10]

**b.** Contrary to countless decisions of this Court stating that statutory interpretation must begin with the plain meaning of the statute's text, *see, e.g.*, *Lamie*, 540 U.S. at 534, 536, petitioners' interpretation of the phrase "voluntarily provided" begins with the "statute['s] design[]" and a "Senate Report." Pet. Br. 45-46. Ultimately, they ask the Court to graft onto the statute a requirement that the relator's provision of information not only be voluntary but "help[ful]." *Id.* at 46. There is no basis in the statute's text or history for this new requirement, nor do petitioners cite a single judicial decision that has

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[10] *See, e.g.*, *Paranich*, 396 F.3d at 340-41 (quoting Sen. Grassley); *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Group, Inc.*, 332 F. Supp. 2d 1, 10 (D.D.C. 2003) ("without need for a subpoena") (relying on Sen. Grassley's statement); *United States ex rel. Ackley v. IBM*, 76 F. Supp. 2d 654, 666 (D. Md. 1999) ("'[v]oluntarily' means not in response to a subpoena") (citing statement by Sen. Grassley); *see also Stinson*, 944 F.2d at 1168 n.1 (Scirica, J., dissenting) (citing statement by Sen. Grassley).

adopted it. The authorities that petitioners *do* cite relate to, in petitioners' words, "disclosure." *Id.* at 47. But § 3730(e)(4)(B) does not require "disclosure" – a word that conveys "making known something that was previously unknown," *Black's Law Dictionary* at 497 – it merely requires that the information be "provided."

In any event, petitioners offer several unpersuasive reasons why Stone did not "voluntarily provide" the Engineering Order to the Government. They assert that Stone's information does not "mention . . . a false statement or claim," "neither predicts nor identifies *any* false claim," and does not "communicate Stone's alleged conclusion that any piping problem will lead to insolid pondcrete." Pet. Br. 45. These complaints have *nothing* to do with the question whether Stone "voluntarily provided" the Engineering Order to the Government. Like petitioners' assertions about Stone's knowledge, *see supra* Part II.B.2.b, the true source of petitioners' discontent is that they do not like the "information" requirement in the statute. But they cannot credibly maintain that Stone did not provide the Engineering Order or any of the other information to the Government in anything but a voluntary manner.

### C. The "Original Source" Provision Should Not Be Construed To Incorporate Concepts Already Present In The Federal Rules Of Civil Procedure

As the foregoing discussion demonstrates, the "original source" provision concerns where and how the relator obtained the information underlying the *qui tam* complaint allegations. Those principles are independent of requirements imposed by the Federal Rules of Civil Procedure, which complement the "original source" exception by independently requiring that a relator's complaint has sufficient legal and factual bases to proceed.

Rule 8(a)(2), for example, speaks to the legal sufficiency of a plaintiff's allegations. It requires a plaintiff to specify "a short and plain statement of the claim showing that

the pleader is entitled to relief." In other words, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any recognizable legal theory" or "allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial." 5 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1216, at 220-27 (3d ed. 2004). The plain meaning of the "original source" exception is of a piece, as it requires the relator to make allegations that, if proven, would entitle the relator to relief on his theory of the case.

But merely alleging violations of the FCA is not enough under the "original source" exception or the Federal Rules. For FCA actions resting on claims of fraud, a relator must comply with Rule 9(b), which requires allegations of fraud to be "stated with particularity." A relator also must satisfy Rule 11(b)(3)'s requirement that "the allegations and other factual contentions have evidentiary support." Thus, Rules 9 and 11 together ensure the *legal* and *factual* adequacy of a relator's allegations of fraud. *See United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018-22 (E.D. Va. 1995) (discussing the relationship between Rules 9 and 11 and § 3730(e)(4)). Those requirements complement the plain meaning of § 3730(e)(4)(B), which requires an "original source" to have "direct and independent knowledge" of *factual* information that supports allegations that, if proven, are *legally* sufficient to entitle the plaintiff to relief.

Rules 8, 9, and 11, moreover, apply to all FCA suits brought by all prospective relators, not just actions "based upon [a] public disclosure." 31 U.S.C. § 3730(e)(4)(A). Thus, these rules always ensure that a relator alleges the essential elements of his claim (Rule 8), pleads fraud with particularity (Rule 9), and has sufficient evidentiary support for his allegations (Rule 11). The "original source" exception does not heighten these requirements in any way. Rather, it seeks to determine whether the prospective relator has "direct and independent knowledge of the

information on which the allegations are based." *Id.* § 3730(e)(4)(B). The "original source" relator's knowledge must result from his own efforts – not the public disclosure or the efforts of others – and he must voluntarily provide his information to the Government prior to filing suit.

## III. THE HISTORY OF THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT CONFIRMS THE STATUTE'S PLAIN MEANING

The current version of the FCA resulted from the 1986 amendment to the 1943 provision, which had precluded any suit based on information in the Government's possession. Following the Seventh Circuit's restrictive interpretation of the 1943 statute in *Dean*, as well as a surge in government fraud in the 1980s, Congress again took up the subject of FCA reform.

"The legislative history in both houses of Congress reveals a sense that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud." *LaValley*, 707 F. Supp. at 1355; *see S. Prawer & Co.*, 24 F.3d at 326. To encourage relators to come forward, the bills included "increased monetary awards, adopted a lower burden of proof, and allowed *qui tam* plaintiffs to continue to participate in the actions after intervention by the government." *Springfield*, 14 F.3d at 651; *see S. Prawer & Co.*, 24 F.3d at 326. But Congress also wanted to be careful not to repeat the mistakes of the 1863 Act, which allowed parasitic suits based purely on publicly available information. To frustrate such suits, the 1986 amendment enacted the "public disclosure bar," which revived the "original source" requirement that had been dropped from the 1943 amendment. *See* 31 U.S.C. § 3730(e)(4)(A); *S. Prawer & Co.*, 24 F.3d at 326; *Springfield*, 14 F.3d at 651.

### A. The Public Disclosure Bar Was Congress's Solution To The Restrictions On *Qui Tam* Suits Imposed By The 1943 Amendment

The first bill reported out of the House Judiciary Committee that led up to the 1986 amendment encouraged more *qui tam* suits by giving relators more rights than they had under the 1943 amendment. The House report makes clear that the committee sought to frustrate parasitic claims while encouraging "individuals who are aware of fraud . . . to bring such information forward." H.R. Rep. No. 99-660, at 23. Because the committee "recognize[d] the validity of the reasons for enactment of the 1943 amendments," it supported a "public disclosure" bar. *Id.* at 22. But the committee also recognized that "there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." *Id.* at 22-23. The House bill therefore barred *qui tam* suits "based solely on public information" unless "the Government had had the information for six months before the *qui tam* action was filed" and not brought a case. *Id.* at 23; Robert L. Vogel, *The Public Disclosure Bar Against* Qui Tam *Suits*, 24 Pub. Cont. L.J. 477, 507 (1995) ("While granting more rights to relators, the House did not want to permit the unrestrained parasitism exemplified by the *Hess* case in which the relator simply found a criminal indictment and turned it into a *qui tam* suit."). To encourage non-parasitic claims, the House bill "increase[d] the awards payable to the relator" and provided "whistle-blower" protections "to those employees who put their jobs on the line by bringing such an action and/or participating in such." Vogel, 24 Pub. Cont. L.J. at 484; *see id.* at 507.[11]

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[11] This additional provision for whistleblowers, which remains in the FCA as enacted, *see* 31 U.S.C. § 3730(h), refutes BP's argument that only a "genuine 'whistleblower[]'" may be an "original source," *Amici* BP Br. 10; *see Walters*, 519 U.S. at 209 ("Statutes must be interpreted, if possible, to give each word some operative effect."). The Act's special whistleblower provision recognizes that an employee who alleges fraud

A parallel Senate bill under consideration at the same time reveals similar motivations. That bill was "aimed at correcting restrictive interpretations of," among other things, "*qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud." S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. 5269. To prevent "windfalls" to "persons who may not have had direct involvement with investigating or exposing alleged false claims that are the basis of a *qui tam* suit," the bill provided that, if "the *qui tam* action is brought at least 6 months after a public disclosure, the Government has failed to act, and the suit succeeds, [then] the individual who brought the action would only receive 'up to 10 percent' depending on his role in advancing the case to litigation." *Id.* at 16, 1986 U.S.C.C.A.N. 5281; *see id.* at 30, 1986 U.S.C.C.A.N. 5295.

The bill the full Senate voted on, however, was not the same as the bill reported out of committee. *See LaValley*, 707 F. Supp. at 1355. "The new Senate version deleted the provision that would have permitted any relator to go forward with a *qui tam* suit if the Government had failed to act on publicly disclosed information for six months." Vogel, 24 Pub. Cont. L.J. at 508; *see LaValley*, 707 F. Supp. at 1356. In its place, the Senate substituted the "original source" exception. *See* 132 Cong. Rec. 20,531 (1986). "Thus, the Senate continued to bar the same type of 'parasitical suits' based on publicly disclosed information which were the concern of Congress in 1943." *LaValley*, 707 F. Supp. at 1356.

House and Senate negotiators ultimately reached a compromise at an "informal conference." Vogel, 24 Pub. Cont. L.J. at 508 (citing 132 Cong. Rec. 28,580 (1986) (statement of Sen. Grassley)). They agreed to adopt the House provisions that encouraged *qui tam* relators to come forward and a "modified version" of the Senate "original source" provision to discourage parasitic suits.

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against his or her employer needs protection from retaliation that a non-employee does not need.

*Id.*; *see LaValley*, 707 F. Supp. at 1356. Thus, the early versions of the 1986 amendment "would have permitted purely parasitic relators . . . with *no* personal knowledge of a fraud to proceed with lawsuits based on public disclosures in *one* circumstance: namely, when the Government had failed to act within six months of the disclosures." Vogel, 24 Pub. Cont. L.J. at 510-11. The final version of the bill barred "purely parasitic relators from going forward under *any* circumstances, requiring instead that all relators have *some* (but not all) information about the fraud that was not derived from certain public sources." *Id.*

### B. The Parasitic Suits That Congress Intended To Foreclose Are Those In Which The Relator's Essential Allegations Of Fraud Are Supported Only By A Public Disclosure

The statutory and legislative history of the 1986 amendment confirms that Congress wanted any relator with information not from a public disclosure to aid the Government's fight against fraud by filing a *qui tam* suit. *See* Thompson, 27 Pub. Cont. L.J. at 704 ("The bar in the 1986 amendments is targeted only at those *qui tam* actions that are completely 'parasitic' – actions that depend entirely on publicly disseminated information from government sources or the news media.").

By incorporating the "original source" exception, rather than the six-month waiting provision originally drafted, Congress demonstrated its dissatisfaction with *Dean* and "the scope of the 1943 jurisdictional bar." Vogel, 24 Pub. Cont. L.J. at 509. Although the "government information bar" allowed parasitic suits after the passage of time, the "public disclosure bar" never allows a parasitic suit. And, unlike the "government information bar," the "public disclosure bar" authorizes suits "based on" a public disclosure, as long as the relator contributes original information to the suit that supports allegations that, if proven, would entitle the relator to relief. By permitting relators with personal knowledge of a fraud to "proceed with a *qui*

*tam* suit even where the information underlying the suit [i]s already known to the public (and, in many instances, the Government)," the final version of the law is a substantial departure from the 1943 amendment and the "government information bar." *Id.* at 510. The result is a regime that enables potential relators with non-public information about government fraud "to supplement the Government's law enforcement efforts with private resources, thereby enabling the Government to resolve fraud allegations more thoroughly and expeditiously." *Id.* at 508 (citing H.R. Rep. No. 99-660, at 22-23; S. Rep. No. 99-345, at 7-8, 1986 U.S.C.C.A.N. 5272-73); *see LaValley*, 707 F. Supp. at 1355.

The public-disclosure bar's focus on precluding only purely parasitic suits confirms that the focus of the "original source" exception is not on whether the relator can decisively prove fraud, but on whether the case "can properly be viewed as [parasitic]." *S. Prawer & Co.*, 24 F.3d at 327. The pertinent question in the "original source" inquiry therefore is not whether the relator has established every element of his cause of action, but whether he has given the Government information that advances the fight against fraud. *See id.* at 327-28; Vogel, 24 Pub. Cont. L.J. at 511. That construction is consistent with Congress's desire "to recharacterize as 'non-parasitic' actions which would have been considered 'parasitic' under the 1943-1986 regime" without returning to the 1863 regime upheld by this Court in *Hess*. *S. Prawer & Co.*, 24 F.3d at 328.

Petitioners' approach would bar many non-parasitic suits, contrary to Congress's intent only to bar parasitic suits and not to repeat the mistakes of the 1943 amendment. Particularly in a case like this one, in which the Government has no objection to the relator's status as an "original source,"[12] it would be contrary to congressional

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[12] *See* Plaintiff United States' Supplemental Response to Defendants' Memorandum Regarding Entry of Judgment at 4, *United States ex*

intent to preclude jurisdiction over a suit brought by a relator with information that gave rise to fraud allegations that ultimately enabled the Government to establish petitioners' liability. The "original source" provision, after all, was enacted to stop the Government from suffering the recovery-diminishing consequences of parasitism – it was not enacted as a sword to be used by FCA defendants to minimize the fee awards they are legally obligated to pay.

## IV. A RESTRICTIVE READING OF THE "ORIGINAL SOURCE" EXCEPTION WILL LEAVE A RANGE OF FRAUDS UNDISCOVERED

Congress's "overall intent" in amending the *qui tam* provisions of the FCA in 1986 was "to encourage more private enforcement suits." S. Rep. No. 99-345, at 23-24, 1986 U.S.C.C.A.N. 5288-89. "In the face of sophisticated and widespread fraud, [Congress] believe[d] only a coordinated effort of both the Government and the citizenry [could] decrease this wave of defrauding public funds." *Id.* at 2, 1986 U.S.C.C.A.N. 5267. Now, 20 years and nearly $20 billion in recoveries later, petitioners seek to alter the balance that Congress struck by further restricting the pool of potential relators. If the Court were to adopt the anti-textual and counter-historical interpretation of the "original source" exception urged by petitioners, it would not only squelch the flow of information about fraud to the Government, but also permit fraudfeasors to drain the U.S. Treasury with impunity. *See* Hesch manuscript at 6 ("Without the help of relators, the government would lose more than one billion dollars per year because 70 percent of all government civil fraud recoveries are from *qui tam* cases.").

When Congress amended the FCA, it recognized the social, psychological, and financial burdens encountered by potential relators when they consider exposing another's fraud. Prior to amending the FCA in 1986, Congress

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*rel. Stone v. Rockwell Int'l Corp.*, No. 89-M-1154 (D. Colo. filed May 6, 1999).

heard from Robert Wityczak, a triple-amputee veteran who exposed the fraudulent charging practices of Rockwell International. Mr. Wityczak told Congress: "I agonized over my decision to step forward. I have a wife, five children and a house mortgage .... Yet once I made the decision to tell the truth about what was going on, I found no one inside or outside the company willing to act on the information." S. Rep. No. 99-345, at 5, 1986 U.S.C.C.A.N. 5270 (ellipsis in original). Petitioners' interpretation of the "original source" exception would silence relators like Wityczak and Stone by creating from whole cloth a heightened evidentiary requirement to the "original source" exception and by requiring courts to examine the proof of fraud after a verdict to determine if the jury convicted based on the allegations in the relator's complaint.

In essence, petitioners advocate rewriting the "original source" exception to require a relator to have "direct and independent knowledge [of all of the information that was presented at trial or was agreed to in a False Claims Act settlement agreement]." But relators rarely, if ever, have complete knowledge of the entire fraudulent scheme.[13] Nor did Congress intend to require them to have such knowledge. Congress did not envision relators delivering ready-made cases to the Government, but instead "believe[d] that the amendments ... [would] allow and encourage *assistance* from the private citizenry" and thereby "make a significant impact on *bolstering* the Government's fraud enforcement effort." *Id.* at 8, 1986 U.S.C.C.A.N. 5273 (emphases added). Petitioners, however, would shift the entire investigative and litigative burden to the relators, thereby deterring all but the rare

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[13] *See Harrison*, 352 F.3d at 919 ("[W]e decline to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement. If we established such a rule, corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability.").

individual who had absolute knowledge of every minute detail of the fraud.

Moreover, even for that rare omniscient relator, petitioners would require him to clear a second hurdle of their own creation: all of the information originally supplied by the relator must have been necessary to achieve a successful verdict or settlement agreement. Thus, instead of a "coordinated effort" between the Government and the relator, the relator would lack the incentive even to assist the Government, fearful that the Government might use uncovered information to venture into new allegations of fraud that were not specifically detailed in the relator's original complaint. Indeed, as applied to this case, the Government could intervene in the relator's action and steer the case to a new path of fraud, thus using the relator's information to the Government's benefit but divesting the relator of any hope of a reward. Under this approach to *qui tam* litigation, no relator or relator's counsel would risk the personal or financial exposure of filing a *qui tam* suit.

This Court therefore should reject petitioners' attempt to shield the discovery of fraud by imposing on potential relators burdensome requirements that are contrary to the statute's plain meaning and Congress's stated intent. In amending the FCA, Congress believed that changes were "necessary to halt the so-called 'conspiracy of silence' that ha[d] allowed fraud against the Government to flourish." S. Rep. No. 99-345, at 6, 1986 U.S.C.C.A.N. 5271. Congress responded by enlisting the help of individuals with information about another's fraud. If petitioners have their way, however, these individuals will be unable and unwilling to join the fight against fraud. The "conspiracy of silence" will once again shroud the fraudfeasors' schemes to the great detriment of the public.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 20, 2006

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(8)

No. 05-1272

Supreme Court, U.S.
FILED
OCT 26 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND
BOEING NORTH AMERICAN, INC.,
*Petitioners*,

v.

UNITED STATES OF AMERICA AND UNITED
STATES OF AMERICA *EX REL.* JAMES S. STONE
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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October 26, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

## TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

THE "ORIGINAL SOURCE" EXCEPTION TO THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR APPLIES ONLY TO PLAINTIFFS WHO ARE A SOURCE OF THE PUBLIC DISCLOSURE ..... 4

A. The Text of Section 3730(e)(4) Identifies an "Original Source" as the Source of the Publicly Disclosed Information ..... 5

B. The Tenth Circuit's Interpretation of Section 3730(e)(4) Departs From Principles of Statutory Construction That Have Been Settled by This Court ..... 10

C. The History of the Public Disclosure Bar Confirms That Congress Intended to Confine the Original Source Exception to Whistleblowers Who Were Sources of the Public Disclosure ..... 14

D. The Interpretation Adopted by the Court of Appeals Fails to Implement the Basic Policies Underlying the Public Disclosure Bar ..... 21

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

Page

### CASES

*Crandon v. United States*,
494 U.S. 152 (1990) ..... 10

*Boeing Co. v. United States ex rel. Kelly*,
510 U.S. 1140 (1994) ..... 1

*FDA v. Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) ..... 13

*Hughes Aircraft Co. v. United States ex rel. Schumer*,
520 U.S. 939 (1997) ..... 1, 5

*Lawson v. Suwannee Fruit & S.S. Co.*,
336 U.S. 198 (1949) ..... 10, 11

*Offshore Logistics, Inc. v. Tallentire*,
477 U.S. 207 (1986) ..... 10

*Philko Aviation, Inc. v. Shacket*,
462 U.S. 406 (1983) ..... 3, 11, 12, 14

*R & F Properties of Lake County, Inc. v. United States ex rel. Walker*, No. 06-152 (pet. for cert.. filed July 31, 2006) ..... 1

*Rapanos v. United States*,
126 S. Ct. 2208 (2006) ..... 2

*Riley v. St. Luke's Episcopal Hospital*,
196 F.3d 514 (5th Cir. 1999) ..... 1

*Robinson v. Shell Oil Co.*,
519 U.S. 337 (1997) ..... 13

*Safir v. Blackwell*,
579 F.2d 742 (2d Cir. 1978) ..... 15

*Stenberg v. Carhart*,
530 U.S. 914 (2000) ..... 13

*United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562 (11th Cir. 1994) ..... 22

*United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) ..... 8, 9, 14

*United States ex rel. Findley v. FPC-Boron Employees' Club*,
105 F.3d 675 (D.C. Cir. 1997) ..... 8, 15, 23

*United States ex rel. Lamers v. City of Green Bay*,
168 F.3d 1013 (7th Cir. 1999) ..... 21

*United States ex rel. Marcus v. Hess*,
317 U.S. 537 (1943) ..... 15

*United States ex rel. Rabushka v. Crane Co.*,
40 F.3d 1509 (8th Cir. 1994) ..... 21

*United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994) ..... *passim*

*United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) ..... 21

*United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) ..... 21

*United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) ..... 15, 16, 21, 23

*United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) ..... 8

*Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ..... 3, 9, 22, 23

**FEDERAL STATUTES**

49 U.S.C. App. § 1301(20) (1982) ..... 12

49 U.S.C. App. § 1403(c) (1982) ..... 12

False Claims Act
31 U.S.C. § 3730(e)(4) ..... *passim*

**LEGISLATIVE MATERIALS**

57 Stat. 608 (1943) ..... 15

S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 9, 16

132 Cong. Rec. 20530 (1986) ..... 3, 6, 17

132 Cong. Rec. 28570 (1986) ..... 18, 20

132 Cong. Rec. 29315 (1986) ..... 20

## MISCELLANEOUS

J. Andrew Jackson & Edward W. Kirsch, THE *QUI TAM* QUAGMIRE: UNDERSTANDING THE LAW IN AN ERA OF AGGRESSIVE EXPANSION (WLF Monograph) (1998) ..... 1

J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005) ..... 1

John T. Boese, *New False Claims Law Incentives Pose Risk to Contractors and States* (WLF Working Paper) (June 2006) ..... 1

## INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting a limited and accountable government, supporting the free enterprise system, and opposing abusive enforcement actions and civil litigation by the government and private litigants. WLF regularly participates in important constitutional and statutory litigation raising these issues.

WLF has appeared before this Court and other federal courts in several cases raising significant issues regarding the civil False Claims Act (FCA). *See, e.g., R & F Properties of Lake County, Inc. v. United States ex rel. Walker, petition for cert. pending*, No. 06-152; *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Boeing Co. v. United States ex rel. Kelly, cert. denied*, 510 U.S. 1140 (1994); *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999).

In addition, WLF's Legal Studies Division produces and distributes legal public policy publications on numerous topics, including the False Claims Act. *See, e.g.*, J. Andrew Jackson & Edward W. Kirsch, THE *QUI TAM* QUAGMIRE: UNDERSTANDING THE LAW IN AN ERA OF AGGRESSIVE EXPANSION (WLF Monograph) (1998); John T. Boese, *New False Claims Law Incentives Pose Risk to Contractors and States* (WLF Working Paper) (June 2006); J. Andrew Jackson, *A Law Gone Rogue: Time to Return Fairness to the False Claims Act* (WLF Legal Backgrounder) (Dec. 16, 2005).

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[1] In accordance with Rule 37.6, amici curiae certify that counsel for a party did not author this brief in whole or in part and that no entity other than amici or their counsel made a monetary contribution to the preparation or submission of the brief.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has previously appeared in this Court as amicus curiae in other cases involving interpretation of federal statutes. *See, e.g.*, *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

Amici curiae submit that over the last two decades the 1986 amendments to the FCA have spawned abusive punitive litigation against businesses, both large and small, to the detriment of those businesses, their employees, their shareholders, and the public at large. The decision of the court of appeals below is particularly troubling in that it upholds and facilitates such *qui tam* suits in circumstances where those suits unquestionably serve no public purpose because the plaintiffs played no role in helping the government protect itself against fraud. Amici believe that this brief will bring an additional perspective to the issue presented in this case and will assist the Court in construing the public disclosure bar of the FCA.

Counsel for the parties have consented to the filing of this brief, as reflected in letters filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

The text of section 3730(e)(4)(A) of the False Claims Act creates a general jurisdictional bar for *qui tam* suits based upon certain publicly disclosed information unless the relator is an "original source of the information." The natural reading of the provision correlates the exception with the general rule. That is, "the information" for which the relator must be a source is the information previously referenced in the sentence – namely, the publicly disclosed information. Thus, a relator can qualify as an "original source" only if he or she is a source of the publicly disclosed information. This reading is confirmed by the explanation of this specific language by the primary sponsor of the legislation. Senator Grassley stated that this

provision "seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual . . . who had not been an original source *to the entity that disclosed the allegations*." 132 Cong. Rec. 20530, 20536 (1986) (emphasis added).

The Tenth Circuit erred in failing to interpret the statute in this way, instead holding that the definitional subsection (B) of section 3730(e) sets forth the *exclusive* requirements for qualifying as an original source. That interpretation conflicts with this Court's settled approach to statutory interpretation, which requires consideration of the statute as a whole – even when the statute contains a definitional section. *See, e.g., Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983). The court's reading also allows a relator to qualify as an "original source" when he is not a "source" in any meaningful way. Moreover, the legislative history shows that Congress intended for subsection (B) to provide a further gloss on the meaning of "original source," but not to supplant the requirement in subsection (A) that the *qui tam* relator be a source of the public disclosure.

Finally, the Tenth Circuit's interpretation undermines the policy of the FCA to encourage individuals to assist the United States in uncovering fraud. In situations where an individual has knowledge of fraud, the Tenth Circuit's interpretation rewards him or her for remaining silent and disclosing the information to the government only on the eve of filing suit, when it is of no assistance. The public disclosure bar would in no way discourage that undesirable conduct. Conversely, a rule limiting the original source exception to relators who are the source of the public disclosure creates an incentive for relators to divulge their information "at the earliest possible time," lest the public disclosure bar come into play. *See Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

## ARGUMENT

### THE "ORIGINAL SOURCE" EXCEPTION TO THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR APPLIES ONLY TO PLAINTIFFS WHO ARE A SOURCE OF THE PUBLIC DISCLOSURE

The "public disclosure" bar of the False Claims Act (FCA), 31 U.S.C. § 3730(e)(4), seeks to advance the fundamental goal of the Act's *qui tam* provisions – namely, enlisting and rewarding private whistleblowers to the extent they can assist in uncovering fraud against the government. In so doing, the provision navigates a middle ground between two competing imperatives. On the one hand, the provision restricts the availability of *qui tam* suits in order to prevent relators who provide no useful assistance to the government from maintaining "parasitic" lawsuits that would enrich those relators at the expense of the government. On the other hand, the provision limits the scope of that jurisdictional bar in order to preserve the *qui tam* suit as an incentive and reward for relators who do assist in uncovering fraud.

The legislative process that sought to balance these competing interests yielded an imperfectly drafted provision containing two subsections that do not seamlessly mesh together. As a result, the courts of appeals have struggled with delineating the qualifications for the original source exception, and some courts erroneously have disregarded important parts of the statute. When section 3730(e)(4) is properly interpreted as an integrated whole, it is apparent that respondent Stone did not make a disclosure that would qualify him as an original source and hence vest the district court with jurisdiction over his lawsuit.

### A. The Text of Section 3730(e)(4) Identifies an "Original Source" as the Source of the Publicly Disclosed Information

The False Claims Act's public disclosure provision was added to the statute in 1986. As discussed in more detail *infra* (at 14-20), Congress sought to modify the existing restriction on *qui tam* suits that had completely barred suits based on information in the hands of the government, even in situations where the goals of the Act would be advanced by such suits. *See generally Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 945-50 (1997). Congress, however, merely modified, rather than eliminated, the restriction because it still wanted to prohibit *qui tam* suits that did not serve the statute's goal of promoting whistleblowing. The rule that emerged, set forth in section 3730(e)(4)(A), contains a general jurisdictional bar and an exception to that bar:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Thus, the general rule is that a relator cannot bring a *qui tam* suit that is based upon information that has been publicly disclosed in certain specified ways. There is an exception to that prohibition for an "original source of the information." The statute does not specifically define the phrase "the information." The only logical reading of the phrase, however, is that it refers to the information previously referenced in the first part of the sentence – namely, the "allegations or transactions" that were publicly disclosed. *See Schumer*, 520 U.S. at 950.

There is no other "information" to which the phrase could refer back.

This interpretation provides a coherently stated rule. The exception (for a source of the public disclosure) is correlated with the general rule (which is triggered by a public disclosure). Moreover, this exception serves the statute's goal of encouraging whistleblowers to assist in exposing fraud against the government. In situations where a relator is the original source of a disclosure, it plainly would be counterproductive and create a strong disincentive to whistleblowing if that disclosure were to operate as a bar to that relator's *qui tam* suit.

Section 3730(e)(4) then goes on in subsection (B) to delineate the meaning of the term "original source" more precisely:

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

This subsection fleshes out the rule of subsection (A) in certain important respects. *See* 132 Cong. Rec. 20530, 20536 (1986) (statement of Sen. Grassley) (explaining that subsection (B) "further define[s]" the term "original source"). It explains that the word "original" means that the source must have "direct and independent knowledge." It also mandates that the relator must make a timely disclosure of the information "to the Government" in order to qualify for the "original source" exception. Subsection (B), however, also muddies the rule because it does not purport to define the phrase "of the information," and hence it neither reemphasizes nor eliminates the connection that is evident in subsection (A) between the information that is publicly disclosed and the relator's status as a source of that information. Indeed, subsection (B) does not mention the public disclosure at all, instead addressing only a disclosure from the relator to the government and the timing of

the relator's lawsuit. This disconnect between subsections (A) and (B) has confounded the courts of appeals in trying to apply the public disclosure provision, with the courts adopting several different interpretations.

The most simplistic approach is exemplified by *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), which avoids the problem by completely ignoring subsection (A). The Fourth Circuit stated that, because there exists "a definition of 'original source' in sub-paragraph (B)," that subparagraph "necessarily" sets forth "the exclusive requirements that a qui tam plaintiff must satisfy to be an 'original source.'" *Id.* at 1351 (internal quotation omitted). Therefore, the Fourth Circuit held, in order to be an "original source" a *qui tam* plaintiff "having direct and independent knowledge of the information on which the allegations in the public disclosure is based . . . need only provide his information to the government before instituting his qui tam action." *Id.* at 1355.

The Fourth Circuit's approach yielded a result plainly at odds with the goals of the FCA. The relator in *Siller* was able to maintain a *qui tam* suit (which was based on allegations disclosed two years earlier in a lawsuit brought against the same defendant by the relator's employer) by invoking a disclosure that did not contribute in any way to uncovering fraud. Only *one week* before filing his lawsuit in 1991, the relator furnished a statement of evidence to the government that mirrored the allegations that had long before been publicly disclosed. *Id.* at 1341. The relator acknowledged that he had been aware of the alleged fraud at least four years earlier, before any lawsuits had been filed against the defendant, but that he had taken no steps to inform the government of his knowledge until after he learned of the FCA's *qui tam* provisions and had retained counsel to commence a *qui tam* suit. *See id.* at 1341 & n.1. Thus, in *Siller*, the *qui tam* relator was no whistleblower. To the contrary, he withheld his information from the government for years and disclosed it only to facilitate his own lawsuit

through literal compliance with the terms of section 3730(e)(4)(B) – at a time when the information provided no assistance to the government whatsoever.

The court of appeals in this case has adopted the same construction of "original source" as the Fourth Circuit, looking exclusively to the requirements of knowledge and disclosure to the government set forth in subsection (B) and ignoring entirely the actual jurisdictional rule stated in subsection (A). Pet. App. 11a, 15a; *see also United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) (adopting the same interpretation). Other courts of appeals, however, have correctly ruled that this interpretation fails to give effect to the entire statute and contravenes the evident intent of Congress. This Court should correct the Tenth Circuit's error and hold that respondent Stone cannot maintain his lawsuit unless he is an original source of the publicly disclosed information.

One of the first cases to interpret the public disclosure bar was *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990), which correctly adopted a more nuanced approach to the statute than did the Fourth Circuit in *Siller*. The court refused to ignore the disconnect between subparagraphs (A) and (B) of section 3730(e)(4). Instead, it observed that "the most natural reading of para. (4)(A) suggests that the 'information' there referred to [for which the relator must be the original source] is that which was publicly disclosed." *Id.* at 17. Noting that subparagraph (B) apparently referred to a different information disclosure, the court therefore concluded that "para. 4(B) does not contain the exclusive requirements in order for one to be an 'original source.'" *Id.* *See also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 689 (D.C. Cir. 1997) (criticizing the Fourth Circuit for failing "to harmonize subparagraph (B) with subparagraph (A), each of which we find to be a necessary component of the exception"). The Second Circuit added that its decision also furthered the FCA's purpose of rewarding

those who "'bring . . . wrongdoing to light'" because "it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time." 912 F.3d at 18 (quoting S. Rep. No. 99-345, at 14 (1986)).

The Ninth Circuit adopted the same interpretation in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), holding that, "[t]o bring a *qui tam* suit [once there has been a public disclosure], one must have had a hand in the public disclosure of allegations that are a part of one's suit." *Id.* at 1418. Like the Second Circuit, the court ruled that it was necessary to look to subsection (A) as well as subsection (B), and it found that the text of subsection (A) should be construed in light of the history of the FCA, which "make[s] clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based." *Id.* Specifically, the Ninth Circuit emphasized that the *qui tam* provisions are designed to reward whistleblowers, and "[a] 'whistleblower' sounds the alarm; he does not echo it." *Id.* at 1419.

The interpretation adopted by the Second and Ninth Circuits is the most sensible reading of the public disclosure bar of section 3730 (e)(4). Subsection (B) explicates and provides an additional gloss on the meaning of the term "original source" in subsection (A) that would not otherwise be apparent, but it does not supersede or eliminate the natural reading of that term in the context of subsection (A).

This reading gives effect to the entire statute and best implements the policies of the FCA. As explained below, it fully accords with the principles of statutory construction previously developed by this Court. And the legislative history reveals that it conforms to Congress's specific intent regarding the scope of the original source exception. Accordingly, this Court should reject the Tenth Circuit's overly expansive reading of the "original source" exception and confirm the natural reading

of the statute that the "source" referenced in subsection (A) is a source of the publicly disclosed information.

### B. The Tenth Circuit's Interpretation of Section 3730(e)(4) Departs From Principles of Statutory Construction That Have Been Settled by This Court

The Tenth Circuit's overly expansive interpretation of the original source exception presumably rests on the same approach to statutory construction relied upon by the Fourth Circuit – namely, the proposition that subparagraph (B) "necessarily" sets forth the "exclusive requirements" because it is "a definition of 'original source.'" *Siller*, 21 F.3d at 1351. That inflexibly narrow focus on the terms of a definitional provision, however, conflicts with well-settled principles of statutory construction. This Court has often emphasized that, "[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986). That fundamental principle does not disappear when the statute contains a definitional provision. To the contrary, this Court has repeatedly rejected proposed statutory interpretations that rest entirely on the terms of a definition and ignore the overall design and object of a statute.

An early example is *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198 (1949), where the Court refused to construe a disability rule in accordance with the statutory definitions set forth in the Longshoremen's and Harbor Workers' Compensation Act. That statute generally provides that an employer is liable for total disability workers' compensation payments if an employee suffers an injury on the job resulting in total disability. Section 8(f)(1) of the Act modified that general rule in cases where the injury, standing alone, would have caused only a partial disability but in fact caused total disability because it was "combined with a previous disability." In that situation,

section 8(f)(1) provided that the employer would be liable only for partial disability payments and a separate federally administered fund would make up the balance necessary to compensate the employee for his total disability. *See id.* at 200. In *Lawson*, the employee had already been blind in one eye when hired and then an accident occurred that deprived him of sight in his good eye. The question before the Court was whether the preexisting blindness in one eye was a "previous disability" within the meaning of section 8(f)(1).

The government argued that the employer was liable for the entire payment because the statutory definition of "disability" did not encompass this employee's prior condition, which did not result from a workplace injury. ("Disability" was defined as "incapacity because of injury" and "injury" in turn was defined by statute as an injury occurring "in the course of employment."). *See id.* The Court, however, ruled that applying the statutory definition of "disability" to section 8(f)(1) would do a "disservice . . . to the purpose of the second injury provision." *Id.* at 201. The Court explained that a key goal of the provision was to encourage employers to hire partially disabled employees without fear that their existing partial disability would expose the employer to a heightened risk of liability for total disability payments. *Id.* at 201-02. Because a "mechanical" reading of the statutory definition would destroy this purpose, the Court held that the statutory definition was not controlling and the word "disability" in section 8(f)(1) should be construed in accordance with the "more usual concept of the word" to encompass disabilities that are not work-related. *Id.* at 201.

Closely analogous to the instant case is *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 409 (1983), where the Court expressly acknowledged that a different result would have obtained if the statute in question "were to be interpreted literally in accordance with the statutory definition." In *Philko*, a seller transferred a plane to a purchaser pursuant to an oral

sales agreement and then subsequently executed a written agreement to sell the same plane to another purchaser. Section 503(c) of the Federal Aviation Act of 1958 had provided that a "conveyance" of an aircraft would not be valid against a subsequent purchaser until it was filed with the Secretary of Transportation. 49 U.S.C. App. § 1403(c) (1982). The second purchaser therefore argued that the first sale was invalid because it was never filed with the Secretary. The statute, however, specifically defined the term "conveyance" as "a bill of sale, contract . . . or other instrument affecting title" (49 U.S.C. App. § 1301(20) (1982)), which would mean that section 503(c) did not come into play for sales not evidenced by a written instrument. This Court rejected the conclusion that would follow from applying the definition, however, stating that it was "convinced . . . that Congress did not intend § 503(c) to be interpreted in this manner." 462 U.S. at 409.

Instead, the Court held that section 503(c) should be construed to mean "that every aircraft transfer must be evidenced by an instrument, and every such instrument must be recorded, before the rights of innocent third parties can be affected." This construction added a new requirement of "evidenced by an instrument" that was not found in the statutory definition. *Id.* at 409-10. The Court's analysis primarily focused not on the definitional provision, but instead on section 503(c), the statutory section that set forth the rule whose interpretation was in dispute. The Court gave two primary reasons for its holding: (a) its interpretation of section 503(c) "would be by far the most natural one" "[i]n the absence of the statutory definition of conveyance"; and (2) literal application of the definition "would defeat the primary congressional purpose for the enactment of § 503(c)." *Id.* at 411.[2]

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[2] The Court also observed that the Act contained a section providing that the statutory definition is not applicable if "the context otherwise requires." *Id.* at 412. The Court did not rely on that section, how-

The Court's more recent decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), reflects the same unwillingness to apply a statutory definition mechanically. The government argued there that the FDA had jurisdiction to regulate tobacco products because tobacco met the statutory definition of a "drug." *See id.* at 126. Although the Court never suggested that tobacco fell outside the terms of the definition (*see id.* at 162 (Breyer, J., dissenting)), it nonetheless rejected the government's position as "contraven[ing] the clear intent of Congress." *Id.* at 132. The Court criticized the government's argument for asking the Court to "confine itself to examining a particular statutory provision in isolation" instead of examining the entire statute and construing it as "an harmonious whole." *Id.* at 132, 133 (internal quotation omitted). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-45 (1997) (although the statute contains a specific definition of the term "employee," that term can be given different meanings in different provisions in light of the broader context of the statute).[3]

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ever, stating that "[e]ven in the absence of such a caveat, we need not read the statutory definition mechanically into § 503(c), since to do so would render the recording system ineffective and thus would defeat the purpose of the legislation. A statutory definition should not be applied in such a manner." *Id.*

[3] The Court has also remarked in certain contexts that when a statute includes an explicit definition, the Court should follow that definition even if it varies from the term's ordinary meaning. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Those statements, however, do not support the Tenth Circuit's approach here of ignoring subsection (A) of the FCA's original source provision. In *Stenberg*, the Court found that the statutory definition specifically included a certain procedure within the term "partial birth abortion," and it rejected the contradictory position that the procedure should nonetheless be excluded because of the common usage of that term. *See also id.* at 998 & n.14 (Thomas, J., dissenting) (discussing other cases). Here,

The Court's approach in these cases is equally applicable here. A proper interpretation of the original source exception cannot focus exclusively on the definitional subsection, but must consider subsection (A) as well, which is the governing provision that creates both the general public disclosure bar and the original source exception. Examining the same two factors that this Court relied upon in *Philko*, the most "natural reading" of the statutory rule is that "the 'information'" for which the relator must be the original source "is that which was publicly disclosed." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d at 17. And an exclusive reliance on the definition in subsection (B) "would defeat" (*Philko*, 462 U.S. at 410) a fundamental purpose of the public disclosure bar because it would allow relators to profit from *qui tam* suits even where they deliberately refrain from providing any whistleblowing benefit to the government. Therefore, the original source exception is properly interpreted by harmonizing the two subsections of section 3730(e)(4) and giving effect to both of them, rather than by ignoring subsection (A) as did the court below.

### C. The History of the Public Disclosure Bar Confirms That Congress Intended to Confine the Original Source Exception to Whistleblowers Who Were Sources of the Public Disclosure

The enactment of section 3730(e)(4) in 1986 grew out of Congress's dissatisfaction with the operation of an FCA provision that had completely barred *qui tam* suits based upon information in the hands of the government. The prior provi-

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however, the interpretation adopted by the Second and Ninth Circuits does not contradict or supersede subsection (B) or seek to exclude any of the attributes of an original source stated there. The interpretation simply augments the definition in subsection (B) by harmonizing it with the somewhat different focus of the statement of the primary rule in subsection (A). *See supra* at 5-6.

sion had been passed in 1943 in response to *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), where this Court held that the Act permitted a *qui tam* suit in which the relator based his complaint entirely upon a publicly available fraud indictment and "contributed nothing to the discovery of the fraud." *See id.* at 545-47. Congress found that result unacceptable and corrected the problem by barring all *qui tam* suits that were "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." 57 Stat. 608 (1943). *See generally United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80 (D.C. Cir. 1997).

By 1986, however, it had become apparent that the 1943 legislation had "overcorrected" the problem because courts were barring *qui tam* suits in some situations where the relators were providing a whistleblowing benefit because they were original sources of the government's information concerning the fraud. The leading decision was *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which the State of Wisconsin sought to bring a *qui tam* suit after it had uncovered Medicare fraud and reported it to the federal government. The court found that the suit was barred because of the government's knowledge of the fraud, even though the government had obtained that knowledge solely through Wisconsin's disclosure. *See id.* at 1102 n.2. Although the court expressed sympathy for Wisconsin's objection that it should not lose its *qui tam* rights because it complied with its requirement to report Medicare fraud, the court stated that this argument was "'addressed to the wrong forum.'" *Id.* at 1107 (quoting *Hess*, 317 U.S. at 547). *See also Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978) (similarly barring a *qui tam* suit where the relator was the source of the government's knowledge, but criticizing the statute).

As a result, the jurisdictional bar at issue in the *Wisconsin* case became one of the areas addressed by Congress when it

undertook a sweeping revision of the FCA in 1986. The Senate Report discussed the case at length and noted that the National Association of Attorneys General had adopted a resolution "strongly urg[ing] that Congress amend the False Claims Act to rectify the unfortunate result of the *Wisconsin v. Dean* decision." S. Rep. No. 99-345, at 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78. The initial bill reported out of committee in late July 1986 sharply reduced the scope of the prior jurisdictional bar, prohibiting *qui tam* actions only when based upon allegations in a suit to which the government is already a party or within six months of certain public disclosures of the information. *Id.* at 43.

The Senate quickly determined, however, that this provision went too far in allowing *qui tam* suits where the relator was not contributing to exposure of the fraud. Accordingly, in early August 1986, the Senate adopted a very different version of the public disclosure provision. This new version resulted from an agreement between Senator Grassley, the principal sponsor of the FCA revision, and several other Senators who had raised concerns over the bill reported out of committee. The August version was very close to the statute at issue here, reading as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, or hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
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> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Govern-

ment or the news media prior to an action filed by the Government.

132 Cong. Rec. 20530, 20531 (1986).

This version did not present any problem of harmonizing the two subsections with respect to the scope of the "original source" exception. Subsection (A) was identical to the statute that exists today; its natural meaning was to impose a jurisdictional bar on suits based on publicly disclosed information unless the relator was an original source of the same information – that is, the information publicly disclosed in certain proceedings, government reports, or the news media. The last clause of subsection (B) fleshed out the meaning of "original source" in a way that correlated with the description in subsection (A). It made clear that the relator's disclosure must be voluntary and must occur prior to the commencement of a government action, two requirements that were not obvious from subsection (A) alone, but it plainly was referring to the same disclosure that made the relator a "source" of publicly disclosed information under subsection (A) – that is, a disclosure to "the Government or the news media."

Senator Grassley's explanation to the Senate of the scope of this amended provision explicitly confirmed the contemplation that an "original source" would have to be a source of the publicly disclosed information. He stated: "This amendment seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual with no direct or independent knowledge of the information or who had not been an original *source to the entity that disclosed the allegations*. 132 Cong. Rec. 20530, 20536 (1986) (emphasis added).

The Senate subsequently made two changes in the final clause of the original source provision in October 1986, also pursuant to Senator Grassley's suggestion. As discussed above, these changes caused subsections (A) and (B) to mesh less well in the final version. It is apparent, however, that these changes were not intended to alter the rule that the original

source exception applies only to a source of the public disclosure. Indeed, they were designed to narrow the exception, not to expand it.

The first change related to the object of the disclosure described in the final clause of subsection (B); the Senate deleted the phrase "or the news media" from that clause. The second change affected the timing requirement for that disclosure. Instead of providing that the disclosure must occur before the government filed suit, the clause was changed to require a disclosure to the government before the *qui tam* relator filed suit. *See* 132 Cong. Rec. 28570, 28576 (1986). No change was made to subsection (A). Thereafter, this amended version was adopted by the House and signed into law.

The reasons for these changes appear self-evident. First, given that assisting *the government* in uncovering fraud is a key purpose of the statute, the Senate determined that a *qui tam* relator should not qualify as a original source unless he or she informs the government of the relevant information. Disclosure merely to the news media is not enough. Second, the Senate realized that it made more sense to key the temporal limitation on the disclosure to a suit brought by the relator, rather than by the government. The original source exception, after all, is an exception to the jurisdictional bar on suits brought *by relators*. There might never be "an action filed by the Government," in which case the disclosure requirement of subsection (B) would never be triggered under the August version of the statute.

The Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (1994), mistakenly concluded that these relatively minor alterations fundamentally changed the scope of the original source exception. The court was prepared to assume, based on Senator Grassley's explanation in August, that "Congress may at one point have intended a plaintiff to be a source to the disclosing entity to be an original source." *Id.* at 1353. Moreover, the court acknowledged that it

would be logical, "in the name of symmetry between subparagraphs (A) and (B), to require the provision of information to all disclosing entities identified in sub-paragraph (A)." *Id.* at 1354 n.14. But the court rejected that logical conclusion on the ground that "the deletion of 'the media' from sub-paragraph (B), if nothing else, is powerful evidence that Congress did not intend a symmetry between the two paragraphs." *Id. See also id.* at 1353 ("Congress presumably would not have deleted the media from the 'original source' definition in sub-paragraph (B) if it intended to require the plaintiff to provide his information to the disclosing entity").

The *Siller* court's analysis is flawed, however, because it presumes that the October 1986 changes were intended to *expand* the boundaries of the original source exception – by removing the requirement of being a source to the disclosing entity. In fact, the changes were designed to *contract* the category of persons who could qualify as an original source. Before the amendments, a relator could have qualified as an original source merely by making a disclosure to the media. The changes eliminated that possibility by requiring the relator to make another disclosure to the government before filing suit. Nothing inherent in the October changes or in any of the relevant explanations suggests a desire to make it easier to qualify as an original source. To the extent the October changes weakened the "symmetry" between subsection (A) and subsection (B), that was an inadvertent result of changes that were made with another goal in mind. Accordingly, this Court should construe the statute as a whole, giving effect to both subsections.

Indeed, the contemporaneous explanations on the floor of Congress indicate a clear intent to preserve the correlation between the concept of an "original source" and the public disclosure. Although Senator Grassley did not specifically address the changes made to subsection (B) of the original source provision, apparently considering them to be minor, he

did address another aspect of the statute that had been changed in October – namely, a proposed provision that limited the amount of recovery by "original source" *qui tam* relators whose suits were based primarily on publicly disclosed information that they had not supplied. *See* Proposed § 3730(d)(1), 132 Cong. Rec. 28570, 28576 (1986). Senator Grassley explained:

> When the *qui tam* plaintiff brings an action based on public information, meaning he is an "original source" within the definition under the act, but the action is based primarily on public information not originally provided by the *qui tam* plaintiff, he is limited to a recovery of not more than 10 percent. In other words, a 10 percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from that original source.

132 Cong. Rec. 28570, 28580 (1986). This explanation plainly contemplates that every "original source" must have been the source of at least some of the publicly disclosed information. It is therefore apparent that even after the October changes Senator Grassley still understood the statute as requiring that the relator be a source of the publicly disclosed information, and he communicated that understanding to the other legislators. In addition, Representative Berman, the primary House sponsor, described the legislation after the October changes as requiring that the relator have been "an original source to the entity that disclosed the allegations." 132 Cong. Rec. 29315, 29322 (1986). Thus, it is clear that the primary sponsors of the FCA amendments, when they changed the text of the original source provision in October 1986, did not intend to eliminate the requirement that an "original source" have been a source of the public disclosure. Nor was anything communicated to the rest of the legislators suggesting any such intent.

In sum, the legislative history confirms the interpretation that flows from reading together the text of both subsections of

section 3730(e)(4). A relator qualifies as an "original source" only if he or she is a source of the public disclosure.

### D. The Interpretation Adopted by the Court of Appeals Fails to Implement the Basic Policies Underlying the Public Disclosure Bar

Notwithstanding the disagreements in the courts of appeals concerning the interpretation of the public disclosure bar, there is no uncertainty over the fundamental policies that underlie that provision. The *qui tam* provisions of the FCA are designed to encourage whistleblowers to assist in uncovering fraud committed against the United States. Allowing "parasitic" lawsuits by plaintiffs who do not themselves contribute to the government's efforts would not advance that goal, and therefore the public disclosure bar is designed to prevent such suits. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991). The original 1943 effort to prohibit parasitic suits, however, went too far. As reflected in *United States ex rel. Wisconsin v. Dean, supra*, it had the effect of barring *qui tam* suits in some situations where the relator had informed the government of the fraud. That result in turn "created its own perverse set of incentives [under which] whistle blowers were afraid to turn over their juiciest evidence of fraud to the government because disclosure would prevent them from using that evidence to get their reward in a *qui tam* action." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1016 (7th Cir. 1999).

The 1986 enactment of the public disclosure bar thus sought to achieve a "golden mean" between competing considerations. *See, e.g., Springfield Terminal*, 14 F.3d at 649. Specifically, the provision "is designed to promote private citizen involvement in exposing fraud against the government, while at the same time prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud." *United States*

*ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994). *See also United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 565 (11th Cir. 1994) ("The 1986 amendments were intended to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it"). The Tenth Circuit's interpretation of section 3730(e)(4), however, frustrates Congress's attempt to achieve this "golden mean" because it rewards "opportunistic late-comers" "who heard of fraud but played no part in exposing it."

In holding that subsection (B) standing alone completely describes the qualifications for being an "original source," the Tenth Circuit has eviscerated the notion that the *qui tam* relator must be a "source," a policy goal that is at the heart of the rule stated in subsection (A). Under the court's holding, the disclosure by the relator that is contemplated by the statute can be purely formalistic; it need not contribute anything to the discovery of the fraud. The facts of *Siller* illustrate this failure to achieve the goals of the statute. The relator had knowledge of the fraud, but chose to sit on his knowledge for years until long after a public disclosure in which he played no role. His disclosure to the government was *pro forma*, designed to meet the literal terms of subsection (B), not to assist the discovery of fraud. *See Siller*, 21 F.3d at 1341. Thus, although the relator met the "original" or "direct and independent knowledge" element of the exception, he was not a "source" of the information in any meaningful way.

The policies of the exception, however, are served only by giving teeth to both the "original" and the "source" parts of the exception. As the Ninth Circuit observed, "[t]he Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics." *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Indeed, if the Tenth Circuit's interpretation is upheld, potential whistle-

blowers would have no incentive to bring wrongdoing to light prior to filing a *qui tam* suit. Conversely, if a public disclosure acts as a bar to a later *qui tam* suit except for plaintiffs who were a source of the public disclosure, as we contend, then individuals with information on government fraud would have a strong incentive "to report such information at the earliest possible time." *Id.* (internal quotation omitted).

Moreover, confining the "original source" exception to relators who are the source of the public disclosure directly addresses the specific problem that was the "catalyst" for the 1986 changes – namely, the decision in *United States ex rel. Wisconsin v. Dean, supra. See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 684 (D.C. Cir. 1997). The concern raised by *Dean* was having the relator's own disclosure boomerang into a ground for barring a later *qui tam* suit, thus creating a strong disincentive for whistleblowers to make the disclosure in the first place. The "original source" exception directly cured that problem by excepting the source of a public disclosure from the general bar created by that disclosure. The Tenth Circuit's interpretation, conversely, does not directly address that problem. It focuses on the state of the relator's knowledge, but takes no account of the extent to which the relator bore any responsibility for the disqualifying public disclosure. Thus, interpreting section 3730(e)(4) to require that an "original source" have been the source of the public disclosure best implements the policies that motivated Congress's enactment of that section.[4]

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[4] The D.C. Circuit harmonized the two subsections in a different way in *Findley*, holding that the relator need not be a source of the public disclosure but that the relator's disclosure to the government must precede the public disclosure. 105 F.3d at 689-91. That interpretation would further the FCA policies that Congress sought to implement in enacting the public disclosure bar in 1986, and it is clearly superior to the interpretation applied by the Tenth Circuit in this case. We believe, however, that construing section 3730(e)(4) to

## CONCLUSION

The judgment of the court of appeals should be reversed.

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October 26, 2006

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require that an original source be a source of the public disclosure is the interpretation that best harmonizes the text of the statute, its history, and the policy goals that Congress unquestionably sought to promote.